The prohibition on religious favoritism was key to the Framers' understanding of the First Amendment and essential to its purposes. *See* Michael W. McConnell, Religious Freedom at a Crossroads, 59 U. Chi. L. Rev. 115, 190 (1992) (Explaining that "[t]he supporters of constitutional protections for religious freedom were insistent that sect equality is an indispensable element of that freedom.") "The Framers and the citizens of their time intended not only to protect the integrity of individual conscience in religious matters, but to guard against the civic divisiveness that follows when the Government weighs in on one side of religious debate. . . ." *McCreary*, 125 S. Ct. at 2722. The Framers "knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval." *Engel v. Vitale*, 370 U.S. 421, 429 (1962). Madison explained that "[t]orrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions," and that "equal and complete liberty" is the only remedy against the "malignant influence" of religious dissension. Memorial and Remonstrance Against Religious Assessments, reprinted in *Everson v. Bd. of Educ.*, 330 U.S. 1, 69 (1947) (appendix to dissenting opinion of Rutledge, J.) Thus, government should eschew legislation that "degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority." *Id.*

The principle of religious equality is not only mandated by the Establishment Clause, but permeates the Bill of Rights. "[T]he Religious Clauses – the Free Exercise Clause, the Establishment Clause, . . . and the Equal Protection Clause as applied to religion – all speak with

one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Kiryas Joel*, 512 U.S. at 715 (O'Connor, J., concurring). So basic is that principle that this Court has consistently applied strict scrutiny to religious discrimination under all three Clauses. *See Larson v. Valente* (applying strict scrutiny under the Establishment Clause); *Church of Lukumi Babalu Aye v. Hialeah* (applying strict scrutiny under the Free Exercise Clause); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (listing classifications based on "race, religion, or alienage" as "inherent suspect distinctions" requiring heightened scrutiny under the Equal Protection Clause).

Indisputably, Chesterfield County has breached this crucial constitutional mandate. It issues invitations to deliver prayers to all Christian, Muslim, and Jewish religious leaders in the County. It refuses to issue invitations to Native Americans, Hindus, Buddhists, Sikhs, Wiccans, or members of any other religion. A clearer demonstration of official preference for some religions over others could hardly be imagined.

By upholding this policy, the decision below strikes an unprecedented blow at this elemental nondiscrimination principle. Indeed, the Fourth Circuit's decision may represent the first occasion in which a federal appellate court has approved a policy that explicitly positions the members of some religions as "insiders," while making "outsiders" of persons from disfavored faiths.

II. *Marsh v. Chambers* Has Given Rise To Inconsistent Lower Court Interpretations That Must Be Resolved By This Court.

In the Fourth Circuit's view, the nondiscrimination principle described in the preceding section was trumped by the holding in *Marsh v. Chambers*, 463 U.S. 783 (1983), which upheld the Nebraska legislature's opening prayers. But this Court has rejected the view that *Marsh* allows religious favoritism. To the contrary, "in *Marsh* itself, the Court recognized that not even the 'unique history' of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating government with any one specific faith or belief." *Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573, 603 (1989) (citation omitted).

The *Marsh* Court approved the Nebraska legislative prayers only because the legislature did *not* demonstrate a preference for one religion over another. First, as *Allegheny* explained, the chaplain in *Marsh* had "removed all references to Christ" from his prayers. 463 U.S. at 793 n.14. Second – and more directly relevant here – Nebraska's legislative chaplain was retained for sixteen years only "because his performance and personal qualities were acceptable to the body appointing him," and *not* based on "an impermissible motive." *Id.* at 793. But *Marsh* did not elaborate on what might be an "impermissible" motive, and neither the County nor the Fourth Circuit attempted to define the term in this case.

In Petitioner's view, the context permits only one interpretation: It is impermissible to select a chaplain *because* of his religious affiliation; he or she must be selected according to religiously neutral criteria. If this view is correct, then Chesterfield County's policy is undoubtedly

unconstitutional, because it explicitly selects some prayer givers, and excludes others, because of their religion.

The crux of the Fourth Circuit opinion is that the Chesterfield County policy "is in many ways more inclusive than that approved by the *Marsh* Court." App. 17. This is a logical fallacy that turns *Marsh* on its head. As *Marsh* recognized, there is nothing "un-inclusive" about selecting a chaplain who happens to be Presbyterian, as long as he is chosen according to religiously neutral criteria and delivers nonsectarian prayers. Choosing a chaplain who happens to be Presbyterian is no less inclusive than choosing a police chief who happens to be Presbyterian, because there is no deliberate exclusion of other faiths. Chesterfield County's scheme is not "more inclusive" simply because more prayer-givers or more denominations are involved. Under that logic, Chesterfield could limit the prayer-givers to, say, Roman Catholics and Methodists, and still be "more inclusive" than the Nebraska legislature, which only had a Presbyterian.

The weaknesses in the Fourth Circuit's interpretation of *Marsh* are highlighted by contrast to the various opinions in *Snyder v. Murray*, 159 F.3d 1227 (10th Cir. 1999), which also dealt with a local legislative body's refusal to allow the plaintiff to give an opening prayer. Like Chesterfield County, Murray City invited local religious leaders to deliver opening invocations. Unlike Chesterfield, however, the Murray City Council included among the invitees "various members of Judeo-Christian congregations, Zen Buddhists, and Native Americans." 159 F.3d at 1228. Snyder wished to deliver a prayer asking God ("if there is a god") to help city council members "see the wisdom of separating church and state and so that they will never

again perform demeaning religious ceremonies." *Id.* at 1229 n.3. The proposed prayer characterized city council members and legislative prayer itself as "hypocritical," "deceptive," and "selfish." *Id.*

The Tenth Circuit posited that *Marsh* imposed two constitutional limits on legislative prayer. First, the content of the prayers must be "within the genre of legislative invocational prayer that 'has become part of the fabric of our society' and constitutes a 'tolerable acknowledgment of beliefs widely held among the people,'" meaning that it must not "'proselytize or advance any one, or to disparage any other, faith or belief.'" *Id.* at 1233-34, quoting *Marsh*, 463 U.S. at 792, 794-95. Based on this limitation, the court upheld the city's rejection of Snyder's prayer. Snyder's "proposed prayer [fell] well outside the genre of legislative prayers that the Supreme Court approved in *Marsh*" because "aggressively proselytize[d] for his particular religious views and strongly disparage[d] other religious views." *Id.* at 1235. It was therefore permissible for the city to refuse to allow Snyder's prayer, because "[a] deliberative body has a right to take steps to avoid the kind of government prayer that would run afoul of Marsh and the Establishment Clause." *Id.*

The *Snyder* court suggested, however, that the result would have been different if Snyder had been excluded because of his religion. In addition to *Marsh*'s requirement that the *content* of legislative prayers be nonsectarian, the Tenth Circuit explained, a legislative body could not express religious preferences through the *selection* of the prayer givers. "As a second constitutional restriction on legislative prayer, the Court in *Marsh* also warned that the selection of the person who is to recite the legislative

body's invocational prayer might itself violate the Establishment Clause if the selection 'stemmed from an impermissible motive.'" *Snyder* at 1234, quoting *Marsh* at 793. According to *Snyder*, "[t]he [*Marsh*] Court implicitly indicated that the particular motive that is 'impermissible' in this context is a motive in selecting the prayer-giver either to 'proselytize' a particular faith or to 'disparage' another faith, or to establish a particular religion as the sanctioned or official religion of the legislative body." *Id.* at 1234, citing *Marsh* at 793-95. *Snyder*'s conception of "impermissible motive" seems to describe precisely the situation in Chesterfield County, which has, through the selection of its prayer-givers, officially sanctioned "Judeo-Christian monotheism."

The concurring and dissenting opinions in *Snyder* offer quite different understandings of *Marsh*, but, like the majority opinion, both are at odds with the Fourth Circuit's interpretation. The concurrence found Murray City's entire prayer practice unconstitutional. According to the concurrence, it was not permissible for the city to censor the content of prayers of private individuals. But to permit all prayers, including Snyder's, would also be unconstitutional. Inevitably, allowing all comers to deliver prayers, without content regulation, would result in the advancement of some religions and the disparagement of others. "The resulting juxtaposition of aggressive proselytization with the exercise of legislative power violates the Establishment Clause." *Snyder* at 1240. The concurrence went on to observe that "[i]n running a prayer session open to the public, the government will need to identify which members of the public appropriately represent the diverse religious life of the community. That will require a government determination of what creeds and philosophies

are to count as religious." *Id.* at 1240. The concurrence's analysis applies with equal force in the present case. In order to maintain an open prayer session, Chesterfield County must either impose content restrictions on prayers, allow prayer-givers to proselytize, or, as it has in fact done, determine which religions "appropriately represent the diverse religious life of the community." In the view of the *Snyder* concurrence, each of these options violates the Establishment Clause.

The dissenting opinion in *Snyder* also noted the tension inherent in opening the prayer to a variety of private individuals, while at the same time prohibiting certain messages. According to the dissent, "the City cannot have it both ways: it cannot purport to open the reverence period to a broad cross-section of the community without restrictions, while at the same time limiting a particular speaker's access to the reverence period because of its distaste for the speaker's proposed message." *Id.* at 1246-47. Again, this analysis would also serve to invalidate Chesterfield County's prayer practices.

Taken together, the three opinions in *Snyder* and the Fourth Circuit opinion in the present case reflect considerable bewilderment about the scope of *Marsh*, especially when the legislative body does not employ a prayer scheme that mirrors that of the First Congress. It is incumbent upon this Court to resolve the confusion.

CONCLUSION

The decision below undermines the countless cases of this Court holding that government may not favor one religion over another. It also reflects a growing confusion

among the lower courts about the scope of *Marsh v. Chambers*. For these reasons, the Petitioner respectfully requests the Court to grant *certiorari*.

Respectfully submitted,

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App. 1

United States Court of Appeals,
Fourth Circuit.
Cynthia SIMPSON, Plaintiff-Appellee,

v.

CHESTERFIELD COUNTY BOARD
OF SUPERVISORS, Defendant-Appellant.
National Legal Foundation, Amicus Supporting
Appellant.
Cynthia Simpson, Plaintiff-Appellant,

v.

Chesterfield County Board Of Supervisors,
Defendant-Appellee.
National Legal Foundation, Amicus Supporting
Appellee.
Nos. 04-1045, 04-1141.

Argued: Feb. 3, 2005.
Decided: April 14, 2005.

ARGUED: Steven Latham Micas, County Attorney's Office for the County of Chesterfield, Chesterfield, Virginia, for Chesterfield County Board of Supervisors. Rebecca Kim Glenberg, American Civil Liberties Union Foundation of Virginia, Richmond, Virginia, for Cynthia Simpson. **ON BRIEF:** Jeffrey L. Mincks, Stylian P. Parthemos, County Attorney's Office for the County of Chesterfield, Chesterfield, Virginia, for Chesterfield County Board of Supervisors. Victor M. Glasberg, Kelly M. Baldrate, Victor M. Glasberg & Associates, Alexandria, Virginia; Ayesha Khan, Americans United For Separation Of Church & State, Washington, D.C., for Cynthia Simpson. Steven W. Fitschen, The National Legal Foundation, Virginia Beach, Virginia, for Amicus Supporting Chesterfield County Board of Supervisors.

Before WILKINSON, NIEMEYER, and WILLIAMS, Circuit Judges.

Affirmed in part, reversed in part, and remanded with directions by published opinion. Judge WILKINSON wrote the opinion, in which Judge NIEMEYER and Judge WILLIAMS joined. Judge NIEMEYER wrote a concurring opinion.

OPINION

WILKINSON, Circuit Judge:

In this case we consider the effect of the Establishment Clause on a local government's policy concerning legislative invocations. Because that policy does not "proselytize or advance any one, or [] disparage any other, faith or belief," *Marsh v. Chambers*, 463 U.S. 783, 794-95, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), we believe it fits within the Supreme Court's requirements for legislative prayer. We therefore remand the case with directions that the district court dismiss the complaint.

I.

A.

Chesterfield County, Virginia, a suburban jurisdiction south of Richmond, has a population of approximately 280,000. The County is governed by a Board of Supervisors composed of five elected representatives. The Board of Supervisors – like the United States Congress and many state and local legislative bodies – has adopted a policy under which its public meetings include a non-sectarian invocation. It instituted this practice in 1984, immediately after the Supreme Court upheld legislative invocations

under the First Amendment's Establishment Clause. *See Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983). The County's policy, tracking the language of *Marsh*, states that each "invocation must be non-sectarian with elements of the American civil religion and must not be used to proselytize or advance any one faith or belief or to disparage any other faith or belief."

On days when it meets, the Board conducts some business in the afternoon, breaking for dinner at about 5:00. The evening session, which begins at 7:00, includes most of the substantive work requiring public hearings, and also provides an opportunity for citizens to address the Board. The Board begins this evening session with a "non-sectarian invocation" and the pledge of allegiance.

Instead of choosing a single chaplain to provide the invocations, the Board invites religious leaders from congregations within Chesterfield County. The Board's clerk maintains a record of such congregations, with addresses taken primarily from the phone book. Each December, the clerk sends an invitation to these congregations, addressed to the "religious leader." Sending these letters is designed to foster widespread participation throughout the County and to facilitate planning. Those who reply are scheduled to give the invocation on a first-come, first-serve basis.

The 2003 list maintained by the clerk includes 235 congregations. The bulk of them, but by no means all, are traditional Christian churches. The Islamic Center of Virginia is in Chesterfield County, and it is on the list. Imams associated with the Center have been involved in giving invocations, including at a Board meeting shortly after September 11, 2001. A Spanish-speaking Protestant

church is on the list too; the invocation on July 25, 2001, given by a minister of that church, was split between Spanish and English. Several Jewish congregations appear on the list, and a rabbi gave an invocation before the Board. Roman Catholic and mainline Protestant churches are well represented, but the list also includes Jehovah's Witness congregations, a number of Mormon churches, and many independent churches.

This diversity reflects the Board's requirement that prayers be "non-sectarian." The magistrate judge noted that this principle was generally satisfied: "As to the effect and/or impact of the invocations . . . , they are but brief, benign pronouncements of simple values that are not controversial nor confrontational but for, at most, mention of specific Judeo-Christian references that are nevertheless clearly recognized as symbols of the universal values intended to be conveyed." *Simpson v. Chesterfield County Bd. of Supervisors*, 292 F.Supp.2d 805, 820 (E.D.Va.2003). The County, seeking to avoid the slightest hint of sectarianism, revised its invitation letter to the clergy. The letter now directs clerics to avoid invoking the name of Jesus Christ, a custom to which Christian clergy often had adhered when closing their invocations in the past.[1]

B.

Cynthia Simpson, a resident of Chesterfield County, contacted the clerk of the County Board in August 2002

[1] That this policy was changed subsequent to litigation is not significant. Precisely the same policy revision was noted in *Marsh* itself, where the complaint was dated December 1979 but the chaplain "removed all references to Christ" in 1980. *Marsh*, 463 U.S. at 793 n. 14, 103 S.Ct. 3330.

seeking to be added to the list of religious leaders available to give an invocation.[1] Asked of which religion she was a leader, Simpson "told [the deputy clerk] that [she] was a witch." Simpson stated in her deposition that there was no difference between the words "Wicca" and "witchcraft," but that "I prefer the words witchcraft and witch myself, but that's a personal preference." She belongs to the Reclaiming Tradition of Wicca, and is a member of a local group known as the Broom Riders Association. Simpson claims eligibility to lead an invocation because she is a "spiritual leader" who frequently takes a leadership position in conducting the rites and worship for her group. Simpson identified herself as "a monotheistic witch" who "believe[s] in the goddess," in a pantheistic sense. Although she acknowledged that in the course of her worship gods and goddesses such as Kore, Diana, Hecate, and Pan had been invoked, she explained that, to her, "they are aspects of the one."

The deputy clerk referred Simpson's request to the County Attorney, who stated to Simpson and her attorneys that she was not eligible to be added to the list. He observed that "Chesterfield's non-sectarian invocations are traditionally made to a divinity that is consistent with the

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[1] The County argues that Simpson lacks standing to bring this suit. She has never been denied the opportunity to address the County Board or to practice her religion. The County also suggests that she lacks standing because her proposed invocation would not, as she acknowledges, "invoke" a deity's guidance, but would be more akin to inspirational, welcoming remarks. We agree with the magistrate judge that Simpson's exclusion from the list of those eligible to give an invocation is an injury sufficient to satisfy standing requirements. *See Simpson*, 292 F.Supp.2d at 809.

Judeo-Christian tradition," a divinity that would not be invoked by practitioners of witchcraft.

The first letter that Simpson's attorney sent to the County, meanwhile, pointed out the constitutional tension in denying witches the opportunity to lead an invocation. She then suggested a solution: "This is easily – and constitutionally – accomplished by eliminating prayer as part of the meetings. If, however, the Board insists on having prayers," it could not exclude Simpson.

Spurred to review its policy by Simpson's repeated requests – the first time the policy had ever been challenged – the County Board affirmed it. After it became clear that the County would not reconsider or make an exception for Simpson, she brought suit in the U.S. District Court for the Eastern District of Virginia. She alleged that her exclusion from the list amounted to a violation of the Establishment Clause in that the County's policy impermissibly advanced Judeo-Christian religions. She also argued that the policy violated her rights under the Free Exercise and Free Speech Clauses of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment.

The district court, on cross motions for summary judgment, granted Simpson's motion as to the Establishment Clause claim, finding that the County had engaged in impermissible denominational preference. It simultaneously granted the County's motion as to the remaining allegations. *Simpson,* 292 F.Supp.2d at 823. Both parties have appealed, and we consider the issues de novo. *See Canal Ins. Co. v. Distribution Servs., Inc.,* 320 F.3d 488, 491 (4th Cir.2003).

II.

The parties here differ as to which lines of precedent govern this case. Simpson rejects the County's argument that the principles of *Marsh v. Chambers* suffice to resolve the dispute. She instead offers, and the district court accepted, *Larson v. Valente*, 456 U.S. 228, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982) (finding "denominational preference" to violate the Establishment Clause), as well as *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) (creating a general framework to evaluate Establishment Clause challenges). We think her reliance on these cases is misplaced and conclude that *Marsh v. Chambers* controls the outcome of this case.

First, *Marsh* deals directly with legislative invocations, the specific issue before us. *Marsh* defines legislative prayer as an act to "invoke Divine guidance on a public body entrusted with making the laws. . . ." *Marsh*, 463 U.S. at 792, 103 S.Ct. 3330. The County's invocations have been explicitly tied to this notion since their inception in 1984.

Second, *Marsh* was decided after both *Lemon* and *Larson*, and it declined to apply either of them. *Marsh* mentioned *Lemon* only once, and then only to note that the court of appeals, which the Supreme Court reversed, had relied on it. *Id.* at 786, 103 S.Ct. 3330. The Court's failure to apply this well-known precedent suggests that *Lemon* was not the proper lens through which to view this particular dispute. *Larson*, meanwhile, was not even referenced, despite being a particularly fresh precedent, decided barely a year before *Marsh* itself. Even though *Marsh* considered the question of clergy selection, which Simpson claims is governed by *Larson*, the Court found

Larson's denominational preference test no more dispositive than it found *Lemon*.

Marsh's refusal to adopt the framework of *Lemon* or *Larson* could not have been inadvertent. This impression is confirmed by the dissent's heavy reliance on both cases, and its frustration that the Court had refused to acknowledge their relevance. The dissent quite accurately observed that "[t]he Court makes no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal 'tests' that have traditionally structured our inquiry under the Establishment Clause," *id.* at 796, 103 S.Ct. 3330 (Brennan, J., dissenting), and asserted that "the Nebraska practice, at least, would fail the *Larson* test." *Id.* at 801 n. 11, 103 S.Ct. 3330 (Brennan, J., dissenting). The dissent added that "if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional." *Id.* at 800-01, 103 S.Ct. 3330 (Brennan, J., dissenting).

We are of course governed not by the dissent, but by the majority. Thus we must follow the rubric announced in *Marsh* itself, and not the tests it rejected, in the limited context of legislative prayer. We do not disrespect *Lemon* or *Larson* by so doing. We simply recognize that their guidance, though generally applicable to Establishment Clause disputes, does not extend to the present controversy. The Court itself recognized as much, stating that in *Marsh* it "did not even apply the *Lemon* 'test.'" *Lynch v. Donnelly,* 465 U.S. 668, 679, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984). *See also Edwards v. Aguillard,* 482 U.S. 578, 583 n. 4, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) (noting that *Marsh* had not applied the *Lemon* test). *Marsh,* in short, has made legislative prayer a field of Establishment

Clause jurisprudence with its own set of boundaries and guidelines. We therefore agree with the Tenth Circuit, considering a similar challenge to a legislative prayer policy, that "the mainline body of Establishment Clause case law provides little guidance for our decision in this case. Our decision, instead, depends on our interpretation of the holding in *Marsh*." *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1232 (10th Cir.1998) (en banc).[3]

Third, applying *Marsh* here follows this circuit's case law. The magistrate judge, during oral argument, remarked that "[s]everal courts, including our own Fourth Circuit, want to escape somewhat of *Marsh*." This is incorrect. Fourth Circuit case law demonstrates not an intent to escape *Marsh* but a determination to apply it as the Supreme Court has directed. Most recently, our decision in *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir.2004), found a Town Council's practice explicitly advancing exclusively Christian themes to be unconstitutional. *Wynne* reached this conclusion by applying *Marsh*, unequivocally signaling thereby that *Marsh* provided the appropriate rubric for questions of this sort.

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[3] Simpson claims that the Court modified *Marsh* in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989). We recognize, as the court did in *Wynne*, that *Allegheny's* language was "carefully considered" and "must be treated as authoritative." *Wynne*, 376 F.3d at 298 n. 3 (internal quotation omitted). That language, however, does not operate to invalidate the County's policy, because that policy does "not demonstrate a preference for one particular sect or creed." *Allegheny*, 492 U.S. at 605, 109 S.Ct. 3086. *Allegheny* concerned religious holiday displays, referencing *Marsh* to confirm that *Marsh* did not apply in that context. Nothing in *Allegheny* suggests that it supplants *Marsh* in the area of legislative prayer.

Moreover, even when we have declined to apply *Marsh*, we have done so in a way that clearly indicates its appropriate application to the present case. For instance, in *North Carolina Civil Liberties Union Legal Foundation v. Constangy*, 947 F.2d 1145, 1148 (4th Cir.1991), we declined to apply *Marsh* for the simple reason that judges praying from the bench did not fit within the ambit of the Court's discussion of *legislative* prayer. Likewise, *Mellen v. Bunting*, 327 F.3d 355, 370 (4th Cir.2003), did not apply *Marsh* because "the supper prayer [at a state-sponsored university] does not share *Marsh's* 'unique history.'"

In short, this case squarely presents questions concerning legislative prayer. To ignore *Marsh*, when the Supreme Court explicitly tied *Marsh* to the domain of legislative prayer, would be to ignore the Supreme Court's own directions. We therefore proceed to apply the principles of *Marsh* to the questions presented in this case. We shall first address the prayers themselves and then take up the aspect of the County's policy governing clergy selection.

III.

A.

Based on the long history of legislative prayer in Congress, *Marsh* concluded that non-sectarian legislative prayer generally does not violate the Establishment Clause. *Marsh*, 463 U.S. at 793-95, 103 S.Ct. 3330. Although Simpson aims much of her challenge at the selection of clergy, the invocations themselves, as part and parcel of the unitary policy under attack, warrant our examination because they are what the general public sees and hears. In other words, "[w]hat matters under *Marsh* is

whether the prayer to be offered fits within the genre of legislative invocational prayer that 'has become part of the fabric of our society'. . . ." *Snyder,* 159 F.3d at 1233 (quoting *Marsh,* 463 U.S. at 792, 103 S.Ct. 3330). As *Marsh* teaches, legislative invocations perform the venerable function of seeking divine guidance for the legislature. As such, these invocations constitute "a tolerable acknowledgment of beliefs widely held among the people of this country," being as we are "'a religious people whose institutions presuppose a Supreme Being.'" *Marsh,* 463 U.S. at 792, 103 S.Ct. 3330 (quoting *Zorach v. Clauson,* 343 U.S. 306, 313, 72 S.Ct. 679, 96 L.Ed. 954 (1952)). The Court also recognized that legislative invocations comport with the Establishment Clause not only because that tradition is ancient, but because invocations are intended to harmonize broadly "'with the tenets of some or all religions.'" *Id.* (quoting *McGowan v. Maryland,* 366 U.S. 420, 442, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961)). Legislative invocations thus belong among "[t]hose government acknowledgments of religion [that] serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Lynch,* 465 U.S. at 693, 104 S.Ct. 1355 (O'Connor, J., concurring).

Additionally, it mattered in *Marsh* that the audience during legislative invocations consists of "adult[s], presumably not readily susceptible to religious indoctrination or peer pressure." *Marsh,* 463 U.S. at 792, 103 S.Ct. 3330 (internal quotations and citations omitted). This contrasts greatly with the Court's concern with, for instance, school children. *See, e.g., Lee v. Weisman,* 505 U.S. 577, 596-97, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (comparing the

"atmosphere at the opening of a session of a state legislature where adults are free to enter and leave" with public school functions like graduations). *See also School Dist. of Abington Tp. v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963); *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962).

Marsh also considered, and found constitutionally acceptable, the fact that the prayers in question fit broadly within "the Judeo-Christian tradition." *Marsh*, 463 U.S. at 793, 103 S.Ct. 3330. The Supreme Court pointedly declined to discount the prospect that such prayer can aid public bodies in the performance of their duties. *Id.* at 792, 103 S.Ct. 3330. Instead, it recognized the capacity of legislative invocations to bring the unifying aspects of our heritage to the difficult task of public deliberation. *See, e.g., id.* at 786, 791, 103 S.Ct. 3330. Simpson's position would essentially repeal this understanding.

B.

In recognizing the value of invocations, *Marsh* did not suggest that there are no limits on the practice of legislative prayer. Rather, the Court stated that a practice would remain constitutionally unremarkable where "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794-95, 103 S.Ct. 3330.

Our recent decision in *Wynne* is illustrative. In *Wynne*, sectarian references in invocations were far more than occasional or incidental. Even a perfunctory reading of the prayers reveals their pervasively and exclusively sectarian nature. In Great Falls, "the Town Council insisted upon invoking the name 'Jesus Christ'" in an exclusive manner

in prayer "in which the Town's citizens participated." *Wynne,* 376 F.3d at 301 & n. 7. Town leaders made plain that they intended to begin meetings with elements of what can only be described as Christian worship. *See id.* at 295 (quoting the mayor as stating that "[t]his is the way we've always done things and we're not going to change").

In finding this practice unconstitutional, the court held that *Marsh* precluded local legislatures from improperly exploiting "a 'prayer opportunity' to 'advance' one religion over others." *Id.* at 298 (quoting *Marsh,* 463 U.S. at 794, 103 S.Ct. 3330). *Wynne* was concerned that repeated invocation of the tenets of a single faith undermined our commitment to participation by persons of all faiths in public life. For ours is a diverse nation not only in matters of secular viewpoint but also in matters of religious adherence. Advancing one specific creed at the outset of each public meeting runs counter to the credo of American pluralism and discourages the diverse views on which our democracy depends.

The facts of *Wynne,* however, contrast sharply with those in the present case. The insistent sectarianism of the Great Falls prayers, *see id.* at 294-96 & n. 2, violated even the spacious boundaries set forth in *Marsh.* Chesterfield's policy, adopted in the immediate aftermath of *Marsh,* echoes rather than exceeds *Marsh's* teachings. The County never insisted on the invocation of Jesus Christ by name, as the Town Council in Great Falls did. *Id.* at 301. In fact, Chesterfield has aspired to non-sectarianism and requested that invocations refrain from using Christ's name or, for that matter, any denominational appeal.

Reflecting the effort to include diverse creeds, Chesterfield has had a wide variety of prayers, the richness of

which is quite revealing. Clerics from multiple faiths and traditions have described divinity in wide and embracive terms – "Lord God, our creator," "giver and sustainer of life," "the God of Abraham, Isaac and Jacob," "the God of Abraham, of Moses, Jesus, and Mohammad," "Heavenly Father," "Lord our Governor," "mighty God," "Lord of Lords, King of Kings, creator of planet Earth and the universe and our own creator." Chesterfield's openness to this ecumenism is consonant with our character both as a nation of faith and as a country of free religious exercise and broad religious tolerance.

Moreover, Chesterfield, unlike Great Falls, did not invite the citizenry at large to participate during its invocations. Board members made clear in depositions that the invocation "is a blessing . . . for the benefit of the board," rather than for the individual leading the invocation or for those who might also be present. In other words, Chesterfield's invocations are "directed only at the legislators themselves," as the court in *Wynne* explained that they should be. *Id.* at 302.

Bearing in mind the differences between Chesterfield's practices and those found wanting in *Wynne*, it is hard to fault the Board for its attempt to foster inclusiveness in invocations. Understood in this manner, Chesterfield's invocation policy embodies the principle that religious expression can promote common bonds through solemnizing rituals, without producing the divisiveness the Establishment Clause seeks rightly to avoid. We therefore conclude that the content of the invocations given at County Board meetings has not "crossed the constitutional line." *Id.* at 298. Rather, the restraints made plain in the Board's policy and respected by those who lead invocations ensure that the prayers do not "proselytize or

advance any one, or [] disparage any other, faith or belief," *Marsh*, 463 U.S. at 794-95, 103 S.Ct. 3330, and therefore are constitutionally sound.

IV.

A.

Simpson argues that even if the invocations themselves are not objectionable, the selection process for those who lead them is. More specifically, she objects to her own exclusion as a potential prayer-giver. Her inability to participate follows from the County's policy, which allows only monotheistic congregations to add their religious leaders to the list of those eligible to give an invocation.

We again apply the principles announced in *Marsh*. In that case, the Supreme Court considered the chaplaincy of the Nebraska legislature, a position with a state-paid salary which for some sixteen years had been held by a single Presbyterian minister. The Court had no concerns with the public funding, which was "grounded in historic practice initiated . . . by the same Congress that drafted the Establishment Clause of the First Amendment." *Id.* at 794, 103 S.Ct. 3330.

Nor was the Court persuaded that the selection of the minister from one denomination, to the exclusion of other clerics, made a constitutional difference. So long as the annual retention of a chaplain did not "ste[m] from an impermissible motive," then "his long tenure does not in itself conflict with the Establishment Clause." *Id.* at 793-94, 103 S.Ct. 3330. Indicating the latitude retained by legislatures, however, the Court did not remand for a determination as to whether there had been such an "impermissible motive." Instead it simply noted that the

Nebraska legislature had not strayed beyond permissible bounds.

In upholding the practice at issue in *Marsh*, the Court relied heavily upon congressional precedent. It noted that only three days after authorizing paid chaplains for each House of Congress, that same First Congress agreed on the final form of the Bill of Rights. *Id.* at 788, 103 S.Ct. 3330. "[T]he practice of opening sessions with prayer has continued without interruption ever since that early session of Congress." *Id.* *Marsh* also indicated that acceptable practice was not limited to the selection of a single minister, as Nebraska had done. In fact, Congress's own method of selecting the prayer giver has not remained constant. *Marsh* noted that although Congress has usually appointed its chaplains, like the Nebraska legislature, it for some time "abandoned th[at] practice . . . in favor of inviting local clergy to officiate." *Id.* at 789 n. 10, 103 S.Ct. 3330 (citing Cong. Globe, 35th Cong., 1st Sess. 14, 27-28 (1857)). This latter system, also part of what the Court saw as a practice "continu[ing] without interruption" since the First Congress, *id.* at 788, 103 S.Ct. 3330, mirrors the system adopted by Chesterfield County.

In noting the Presbyterian identity of the chaplain in *Marsh*, the Court recognized the reality that *any* choice of minister would reflect, if not denominational preference, then at least denominational awareness. *Id.* at 793, 103 S.Ct. 3330. A chaplain by definition is a member of one denomination or faith. Yet this did not cause the Court in *Marsh* to void the practice of the Nebraska legislature. A party challenging a legislative invocation practice cannot, therefore, rely on the mere fact that the selecting authority chose a representative of a particular faith, because

some adherent or representative of some faith will invariably give the invocation.

B.

The principles set forth in *Marsh* work to sustain the County's clergy selection policy. The fact that Chesterfield's invocations are not given by a single, paid chaplain does not deprive the County of *Marsh's* protection. Indeed, the selection aspect of the practice here is in many ways more inclusive than that approved by the *Marsh* Court. Ministers in Chesterfield, unlike in *Marsh*, are not paid with public funds. In contrast to *Marsh's* single Presbyterian clergyman, the County welcomes rabbis, imams, priests, pastors, and ministers. Chesterfield not only sought but achieved diversity. Its first-come, first-serve system led to prayers being given by a wide cross-section of the County's religious leaders.[4]

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[4] Simpson nonetheless complains that the cross-section of religious leaders failed to include her. She says the County's refusal to allow her to lead an invocation was not due solely to the fact that she was an acknowledged pantheist. She notes that one County Board member was quoted in the press as stating, "It is a mockery. It is not any religion I would subscribe to." A second Board member was quoted in an October 5, 2002, article as saying, "I hope she's a good witch like Glenda," and "There is always Halloween." This Board member later explained that she made these comments immediately after returning to the Board after two months of maternity leave. During her leave, she had been targeted by the "World Church of the Creator about being a woman in office." At this point, during the commotion of returning to work as a Board member, another member of the Board briefly mentioned to her that a constituent who was a witch had requested permission to lead an invocation. Without then knowing who Simpson was or even what Wicca was, she was contacted by a journalist less than a day later and gave the flippant responses noted above. In her deposition, the Board member acknowledged that those statements "were not respectful of

(Continued on following page)

Moreover, any particular cleric who leads an invocation in Chesterfield is self-selected. The Nebraska legislature chose its chaplain itself, but the Chesterfield Board does not even know the names of clerics, since invitations are sent to congregations, addressed only to the "religious leader." The County has no ability to dictate selection; the clergy itself controls it by choosing to respond or not.

Simpson regards the County's inclusiveness as a negative, because in moving beyond *Marsh's* approval of a single Presbyterian minister, the County has not also chosen to go beyond the monotheistic tradition. But neither *Marsh* nor our case law bars this approach in the legislative invocation context. The plaintiff in *Wynne,* for instance, did not challenge the prayer-giver, even though she knew that her request – to substitute numerous references to "Jesus Christ" with something general, like "God," *see Wynne,* 376 F.3d at 296 – would still allow prayers to be given by the same representatives who gave the sectarian prayers to which she had objected.

The Supreme Court, elaborating on the proscriptions in *Marsh,* has noted that

> in *Marsh* itself, the Court recognized that not even the 'unique history' of legislative prayer can justify contemporary legislative prayers that have the effect

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Wiccans" and explained that her jesting reference to Halloween came simply because the month of October – when the interview occurred – makes such images readily available. Such statements, even if they were off the cuff and made in jest, undermine the respect that is due to any citizen. On the other hand, such ill-advised remarks do not override the fact that the County seriously considered Simpson's request and, as described at length herein, adopted an indisputably broad and inclusive legislative invocation practice.

> of affiliating the government with any one specific faith or belief. The legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had 'removed all references to Christ.'

County of Allegheny v. Am. Civil Liberties Union, 492 U.S. 573, 603, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) (internal citations omitted). The Court, neither in *Marsh* nor in *Allegheny*, held that the identity of the prayer-giver, rather than the content of the prayer, was what would "affiliat[e] the government with any one specific faith or belief." Chesterfield has likewise made plain that it was not affiliated with any one specific faith by opening its doors to a very wide pool of clergy. The Judeo-Christian tradition is, after all, not a single faith but an umbrella covering many faiths. We need not resolve the parties' dispute as to its precise extent, as Chesterfield County has spread it wide enough in this case to include Islam. For these efforts, the County should not be made the object of constitutional condemnation.

It would, of course, be possible for any court to pick fault with any elected body's selection of clergy. While deference under *Marsh* is not unlimited, too much judicial fine-tuning of legislative prayer policies risks unwarranted interference in the internal operations of a coordinate branch. The Chesterfield policy of clergy selection may not encompass as much as Simpson would like, and were it to be applied beyond the "unique" and limited context of legislative prayer, *see Marsh*, 463 U.S. at 791, 103 S.Ct. 3330, it may not encompass as much as *Larson* would require. But that context is all important, for if *Marsh* means anything, it is that the Establishment Clause does not scrutinize legislative invocations with the same rigor that it appraises other religious activities. At oral argument,

counsel for Simpson tried to equate the selection of a cleric with the selection of a county assessor. It is unsurprising, however, that scrutiny of governmental actions outside the realm of legislative prayer, such as ordinary hiring practices for government jobs, might follow different standards. Chesterfield has followed the standards that control – those of *Marsh*.

C.

Simpson's attempt to make the greater inclusiveness of the Chesterfield policy the very basis of its invalidation would achieve a particularly perverse result. For it would push localities intent on avoiding litigation to select only one minister from only one faith. We do not believe *Marsh* intended to mandate such exclusivity. It is true that Nebraska hired only one Presbyterian minister for sixteen years. But nothing in *Marsh* says that legislative or local governmental bodies must have a single minister or chaplain drawn from only one denomination. *Marsh's* caution against "impermissible motives" does not fasten on local governments a *limitation* to a prayer-giver from one religious view. This would have the consequence of making America and its public events more insular and sectarian rather than less so.

In seeking to invalidate the Chesterfield system, Simpson effectively denies the ecumenical potential of legislative invocations, and ignores *Marsh's* insight that ministers of any given faith can appeal beyond their own adherents. Indeed, *Marsh* requires that a divine appeal be wide-ranging, tying its legitimacy to common religious ground. *See Marsh*, 463 U.S. at 786, 792, 103 S.Ct. 3330. Invocations across our country have been capable of

transcending denominational boundaries and appealing broadly to the aspirations of all citizens. As *Marsh* and other cases recognize, appropriately ecumenical invocations can be "solemnizing occasions" that highlight "beliefs widely held." *See, e.g., Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 124 S.Ct. 2301, 2322, 159 L.Ed.2d 98 (2004) (O'Connor, J., concurring in judgment); *Allegheny*, 492 U.S. at 625 (O'Connor, J., concurring in part); *Lynch*, 465 U.S. at 693, 104 S.Ct. 1355 (O'Connor, J., concurring).

We cannot adopt a view of the tradition of legislative prayer that chops up American citizens on public occasions into representatives of one sect and one sect only, whether Christian, Jewish, or Wiccan. In private observances, the faithful surely choose to express the unique aspects of their creeds. But in their civic faith, Americans have reached more broadly. Our civic faith seeks guidance that is not the property of any sect. To ban all manifestations of this faith would needlessly transform and devitalize the very nature of our culture. When we gather as Americans, we do not abandon all expressions of religious faith. Instead, our expressions evoke common and inclusive themes and forswear, as Chesterfield has done, the forbidding character of sectarian invocations.

V.

Simpson also raised a challenge to the County's practice under the Free Exercise and Free Speech Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. We affirm the magistrate judge's grant of summary judgment to the County on these claims.

The district court correctly concluded that "the issue of whether [Simpson] has been denied her full, free, and equal right to express and exercise her religious beliefs is subject to a unitary analysis." *Simpson*, 292 F.Supp.2d at 818 (citing *Columbia Union College v. Clarke*, 159 F.3d 151, 155 n. 1 (4th Cir.1998)). Correctly adhering to Supreme Court precedent, the district court also found that this issue turns on the characterization of the invocations as government speech:

> The avowed purpose of the invocation is simply that of a brief pronouncement of simple values presumably intended to solemnize the occasion. The invocation is not intended for the exchange of views or other public discourse. Nor is it intended for the exercise of one's religion. . . . The context, and to a degree, the content of the invocation segment is governed by established guidelines by which the Board may regulate the content of what is or is not expressed when it "enlists private entities to convey its own message."

Simpson, 292 F.Supp.2d at 819 (internal citations omitted) (quoting *Rosenberger v. Rector*, 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995)).

We therefore agree with the district court's determination that the speech in this case was government speech "subject only to the proscriptions of the Establishment Clause." *Id.* at 820, 115 S.Ct. 2510. In light of our conclusion that none of the Establishment Clause's proscriptions were transgressed here, the standards for challenges to government speech, properly applied by the district court, require that Simpson's other claims must be rejected.

For these reasons, the judgment of the district court is affirmed in part, reversed in part, and remanded with directions to dismiss the complaint.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS.

NIEMEYER, Circuit Judge, concurring:

I am pleased to join Judge Wilkinson's fine opinion. I write separately only to clarify an implicit argument in the opinion, *supra* at 284, which, if recognized explicitly, demonstrates conclusively the propriety of relying on *Marsh v. Chambers*, 463 U.S. 783, 793, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), to dispose of the case before us.

It is well-accepted that the analysis for scrutinizing the government's own speech under the First Amendment is different from and more relaxed than the analysis for scrutinizing government prohibitions or impositions of speech *on the people*. *See Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000); *id.* at 235, 120 S.Ct. 1346 ("Where the [State] University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different"). This is so because "when the State is the speaker, it may make content-based choices." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). Similarly, the analysis for scrutinizing the government's own prayer under the First Amendment is different from and more relaxed than the analysis for scrutinizing government prescriptions or proscriptions of prayer *for the people*. *See County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 603 n. 52, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) ("Legislative prayer does not urge citizens to engage in religious practices, and on that basis could well be distinguishable from an exhortation from government *to the people* that they

engage in religious conduct") (emphasis added). These distinctions flow from the structure of the Constitution itself, under which "We the People" insist on the prohibition of various governmental intrusions *on the people's* liberty.

Thus, when a governmental body engages in prayer for itself and does not impose that prayer *on the people,* the governmental body is given greater latitude than when the government imposes prayer *on the people.* When the "people" are involved, the Supreme Court has held that the Establishment Clause "guarantees that government may not coerce *anyone* to support or participate in religion or its exercise, or otherwise act in a way which establishes a state religion or religious faith, or tends to do so." *Lee v. Weisman,* 505 U.S. 577, 587, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (emphasis added) (citations and internal quotation marks omitted). It is a cornerstone principle of our Establishment Clause jurisprudence that "it is no part of the business of government to compose official prayers *for any group of the American people* to recite as a part of a religious program carried on by government." *Engel v. Vitale,* 370 U.S. 421, 425, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962) (emphasis added); *see also Weisman,* 505 U.S. at 589, 112 S.Ct. 2649 ("The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State").

But when members of a governmental body participate in a prayer for themselves and do not impose it on or prescribe it for *the people,* the religious liberties secured *to the people* by the First Amendment are not *directly* implicated, and the distinct, more tolerant analysis articulated in *Marsh* governs. *Marsh* holds, as Judge Wilkinson ably

articulates in his opinion for the court, that a governmental body may select and say nondenominational prayers for the purpose and benefit *of that body* so long as the prayers do not "proselytize or advance any one, or ... disparage any other, faith or belief." 463 U.S. at 794-95, 103 S.Ct. 3330; *cf. Rust v. Sullivan*, 500 U.S. 173, 192-200, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) (holding that the government may control the content of its speech).

Ever since *Marsh*, the Supreme Court has continued to recognize the distinction between prayer engaged in by the government for itself and prayer imposed on the people, subjecting the latter form of prayer to heightened scrutiny. In *County of Allegheny v. American Civil Liberties Union*, for example, the Court explicitly relied on this distinction:

> It is worth noting that just because *Marsh* sustained the validity of legislative prayer, it does not necessarily follow that practices like proclaiming a National Day of Prayer are constitutional. *Legislative prayer does not urge citizens to engage in religious practices, and on that basis could well be distinguishable from the exhortation from government to the people that they engage in religious conduct.*

492 U.S. at 603 n. 52, 109 S.Ct. 3086 (emphasis added) (citation omitted).

Our recent decisions in *Mellen v. Bunting*, 327 F.3d 355 (4th Cir.2003), and *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir.2004), are fully consistent with the distinction made between legislative prayer and prayer *for the people*. In *Mellen*, we struck down a prayer said at evening meals at the Virginia Military Institute, a state college, when the prayer was composed and sponsored by

state officials for "the people," i.e. the students during the meal hour. 327 F.3d at 375. And in *Wynne*, we struck down a uniquely Christian legislative prayer designed for and participated in *by the people*. 376 F.3d at 302. In response to the Town Council's argument in *Wynne* that its prayer should be approved under *Marsh* because it was given for the Town Council, not the people, we said:

> The Town Council briefly contends that the prayers at issue here were "only and for the benefit of the Council members." Given the record evidence and unchallenged factual findings of the district court, that contention is simply untenable. The district court found that the Town Council specifically listed the prayers first on its agenda of public business and that citizens customarily participated in the prayers by standing and bowing their heads. Indeed, citizens actively joined in the prayers by declaring "amen" and sometimes "hallelujah" at the conclusion. . . . Finally in its June 2003 Resolution, the Town Council stated that the "invocation may request divine guidance for the *Town of Great Falls and its . . . citizens*," (emphasis added), and so itself has recognized that the town's prayers are not just for council members but for all of the Town's citizens. *Thus, in a very real sense, the Town Council has directed Christian prayers at – and thereby advanced Christianity to – the citizens in attendance at its meetings and the citizenry at large.*

Wynne, 376 F.3d at 301 n. 7 (second emphasis added) (citations omitted).

The undisputed evidence in the case before us readily distinguishes this case from *Wynne* because the Chesterfield County Board of Supervisors engages in prayer for itself and *not for the people*. As one of the supervisors testified:

> The purpose of an invocation is for the board members to invoke God's blessing upon our organization, upon our meetings, and that is my understanding as to what the board's purpose is, is *to serve the board*, not the individual.
>
> * * *
>
> [I]t's to have God's blessing invoked on sometimes very contentious hearings. *It's for our benefit.*

(Emphasis added).

And this is precisely the type of prayer considered and upheld against an Establishment Clause challenge in *Marsh*. *See* 463 U.S. at 792, 103 S.Ct. 3330 (pointing out that the prayer there was "[t]o invoke Divine guidance on a public body entrusted with making the laws"). Because the prayers received and used by the Chesterfield County Board of Supervisors were for the Board alone – to invoke God's blessing upon that organization – under *Marsh*, the Board's selection and use of prayer did not amount to "an 'establishment' of religion or a step toward establishment." *Id.*

United States District Court,
E.D. Virginia,
Richmond Division.
Cynthia SIMPSON, Plaintiff,

v.

CHESTERFIELD COUNTY BOARD
OF SUPERVISORS, Defendant,
No. CIV.A. 3:02CV888.

Nov. 13, 2003.

Victor Michael Glasberg, Victor M. Glasberg & Associates, Alexandria, VA, Rebecca Kim Glenberg, Richmond, VA, Ayesha Khan, Washington, DC, for Plaintiff.

Stylian P. Parthemos, Steven Latham Micas, Chesterfield County Attorney's Office, Chesterfield, VA, for Defendant.

MEMORANDUM OPINION

DOHNAL, United States Magistrate Judge.

This matter is before the court by consent of the parties (28 U.S.C. § 636(c)(1)) on cross motions for summary judgment. Fed.R.Civ.P. 56. The Plaintiff asserts, in her individual capacity, that the Chesterfield County Board of Supervisors' (the Board) established policy that restricts the giving of invocations at its public sessions to religious representatives of the Judeo-Christian tradition constitutes an impermissible preference for a certain set of beliefs over all others, including her own, in violation of the Establishment Clause of the First Amendment. (Compl.). Plaintiff also asserts that her rights to the free and equal exercise and expression of her religion have been violated by the Board under color of state law in

violation of constitutional and statutory provisions. (Compl. ¶ 2; Pl.'s Mot. Summ. J.) (citing U.S. Const., amend. I, cl. 1; amend. XIV; 42 U.S.C. § 1983). The Board contends in defense, and in support of its reciprocal demand for dispositive relief, that the subject policy does not promote any particular religion; it does not constitute an unconstitutional entanglement of government and religion; Plaintiff's asserted First and Fourteenth Amendment rights to the full, free, and equal exercise and expression (free speech) of her professed religious beliefs have not been violated because no public forum is involved in which such rights would be implicated; and no one, including Plaintiff, is discriminated against on the basis of religion in the promulgation and/or application of the policy. (Def.'s Mot. Summ. J.). For the reasons set forth herein, each motion for summary judgment is GRANTED in part and DENIED in part.

Standard of Review

Summary judgment is only to be granted when there is no genuine dispute as to any issue of material fact when all justifiable inferences are drawn in favor of the non-moving party and the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). However, unsupported conclusory allegations by the non-moving party are not sufficient to create a genuine dispute of material fact so as to withstand the granting of relief. *Celotex Corp.*, 477 U.S. at 327, 106 S.Ct. 2548 (White, J., concurring). In essence, the court must decide if the evidence when viewed in the light most favorable to the non-moving party "presents a sufficient

disagreement to require submission to the [factfinder] or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-252, 106 S.Ct. 2505.

Undisputed Material Facts and Justifiable Inferences

The court deems the following to be the undisputed material facts and justifiable inferences on which the resolution of the pending motions is properly based:[1]

1. The Board is the governing legislative body of a state locality that acts under color of state law. (Compl. ¶ 4).

2. The Board has maintained a policy since approximately 1984 whereby invocations are given at each regularly-scheduled public meeting of the Board. (Compl. ¶ 7; Def.'s Mem. ¶¶ 1, 4).

3. The stated policy provides that all invocations "must be non-sectarian with elements of the American civil religion and must not be used to proselytize or advance any one faith or belief or to disparage any other faith or belief." (Def.'s Mem. ex. A).

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[1] In addition to the parties' statements of undisputed facts as set forth in their respective memoranda as required by Local Rule, the court also accepts as true all factual allegations in the Complaint not contested by the Defendant by affidavit or other evidentiary material. (Mem. Supp. of Pl.'s Mot. Summ. J. (Pl.'s Mem.) at 1-5); Mem. Supp. of Def.'s Mot. Summ. J. (Def.'s Mem.) at 21-22; *see also Reyes v. City of Lynchburg*, 300 F.3d 449, 460 (4th Cir.2002) (Michael, J., dissenting) ("For summary judgment purposes, '[a]llegations in a complaint, which are not contested by the moving party by affidavit or other evidentiary materials, are assumed true'") (quoting *Elbe v. Yankton Indep. Sch. Dist. No. 1*, 714 F.2d 848, 850 (8th Cir.1983)).

4. Only the identity of the congregations of monotheistic religions with an established presence in the local community served by the Board are eligible to be placed on a list from which the respective leader is invited on a "first-come first-serve" basis to offer an invocation. (Def.'s Mem., Blakley Aff. ¶¶ 32,34; exs. A-C).

5. The policy's requirement that invocations contain elements of the American civil religion has been consistently interpreted and applied by the Board to allow only representatives of the Judeo-Christian tradition (Protestant, Catholic, and Jewish religions) and, on one isolated occasion, the Islamic faith, to be invited to give invocations. (Def.'s Mem. ¶ 8).

6. There is no evidence that invocations have been utilized to proselytize or advance any religion other than by reference to the name and being of the Judeo-Christian divinity (God) and Jesus Christ in most of the invocations given. (Pl.'s Mem. ex. 3 (Miller dep.) at 44-45; ex. 4 (Humphrey dep.) at 84; ex. 6).

7. There is no allegation or evidence that representatives of any polytheistic or other non-monotheistic religion were invited to give invocations.

8. Although the Board's meetings at which the invocations are offered are opened to the public, no opportunity is provided during the invocation period for public comment or discourse; rather, a separate opportunity is allowed later in the Board's agenda "for citizens to address the Board of Supervisors on matters involving the services, policies and affairs of the County." (Def.'s Mem., Blakley Aff. ¶ 10).

9. Plaintiff is a member and leader in the religion known as "Wicca" or "witchcraft" that has an established membership base within the local community governed by the Board. (Pl.'s Mem. ex. 1, ¶¶ 2, 6-7).

10. The Wicca religion includes a broad array of religious beliefs, practices, and traditions of a polytheistic and pantheistic nature that focus on the change of seasons and other natural phenomena. (*Id.* at ¶ 2).

11. The Wicca religion is not monotheistic at least in the same consistent sense as are the faiths of the Judeo-Christian tradition. (*Id.* at ¶ 4).

12. Plaintiff was prepared to present a non-sectarian invocation espousing basic values consistent with general themes about "life, death, and creation, and about how to live a good and ethical life." (Compl. ¶ 19; Pl.'s Mem. ex. 1 (Simpson Decl.) ¶ 15; ex. 8d).

13. The Board denied Plaintiff's repeated requests to provide a non-sectarian invocation for the following stated reason: "Chesterfield's non-sectarian invocations are traditionally made to a divinity that is consistent with the Judeo-Christian tradition. Based upon our review of Wicca, it is neo-pagan and invokes polytheistic, pre-Christian deities. Accordingly, we cannot honor your request to be included on the list of religious leaders that are invited to provide invocations at the meetings of the Board of Supervisors." (Compl. ¶ 11).

14. Plaintiff specifically requested the Board to change its policy so as to allow her to participate in offering invocations, but the Board declined to do so and specifically reaffirmed the existing policy in response to Plaintiff's requests. (Pl.'s Mem. ex. B, attached exs. C, D, E, F, and G).

15. There are recognized religions in America other than Wicca that are not considered to be "monotheistic" or of the "Judeo-Christian" tradition, including, for example, Afro-Caribbean religions (*e.g.*, Santeria, Vodou, and Rastafarianism), Buddhism, Hinduism, the various Native American traditions, Bah'i, Jainism,

Sikhism, Shinto, Taoism, and Zoroastrianism. (Pl.'s Mem. ¶ 28 (citing attached exhibits)).

Analysis

Case or Controversy/Standing

As a preliminary issue, the Defendant challenges the Plaintiff's ability to maintain the action on the grounds that the Board's policy is unassailable in that it constitutes nothing less than "a proper distinction based on the American civil religion" as sanctioned by Supreme Court precedent. (Def.'s Mem. at 10-11). The Defendant also asserts that no "case or controversy" in which Plaintiff has standing has been presented because Plaintiff has not suffered any personal "injury" where she was never denied the right to practice her religion or to address the Board as an individual, tax-paying citizen or representative of her religion during its public comment segment. (Def.'s Mem. at 12-14).

It is well-settled that in First Amendment claims in which no direct economic harm or injury is alleged, an individual establishes standing in a case or controversy if it can be demonstrated that the individual is "directly affected by the laws and practices against [which] their complaints are directed." *Sch. Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 224 n. 9, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963).[2] In this regard, Plaintiff's exclusion from the

[2] *See also Smith v. County of Albemarle*, 895 F.2d 953, 955 (4th Cir.1990) (finding that "recent authority" contradicted the Defendant's assertion that the Plaintiffs, who were taxpayers and county residents, had no standing to bring an Establishment Clause claim against the county challenging the erection of a nativity scene on the front lawn of the county office building absent personal economic injury).

challenged process, that is, not being eligible to give an invocation, is no less an actionable injury than that suffered by school children and their parents who, in *Schempp*, challenged a state law that required the Bible to be read during each school session. Similarly, the plaintiffs in *Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir.1987) (quoting *Schempp*), were deemed to have standing to challenge the use of the word "Christianity" on a city's official seal that was placed on unsolicited correspondence that they simply received in the mails. *See also ACLU v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1107-1108 (11th Cir.1983) (plaintiffs had standing to challenge placement of a cross in a public park that made them feel like second class citizens). Here, Defendant argues, in part, that Plaintiff has not suffered any injury, constitutional or otherwise, because she always had an opportunity to address whatever issues she wanted in the open portion of the Board's meeting. (Undisputed Facts and Justifiable Inferences (Findings) ¶ 8). However, it is her preclusion and exclusion from the invocation segment that, in effect, altered her behavior in the sense of foreclosing her affirmative desire to participate, a consequence of the challenged policy no less actionable than that in the case law noted. Accordingly, the Plaintiff has presented a case or controversy of constitutional dimension for which she has standing to pursue, subject to a determination that valid religious issues are implicated.

Establishment Clause

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. Const., amend. I. The First Amendment

is made applicable to the states by virtue of the due process clause of Fourteenth Amendment. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 8, 67 S.Ct. 504, 91 L.Ed. 711 (1947) (applying Establishment Clause to states). First Amendment violations are also actionable against governmental entities by separate statutory authority where, as here, state "actors" are alleged to have caused the constitutional violation. 42 U.S.C. § 1983. The basic issue in this case concerns what is commonly referred to as "legislative prayer," that is, prayer authorized by a governing body that is typically intended to instill a sense of purpose and solemnity over its proceedings and actions or for other comparable motivational objectives. Legislative prayer is not unconstitutional, *per se:*

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country. As Justice Douglas observed, "[w]e are a religious people whose institutions presuppose a Supreme Being."

Marsh v. Chambers, 463 U.S. 783, 792, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983) (quoting *Zorach v. Clauson*, 343 U.S. 306, 313, 72 S.Ct. 679, 96 L.Ed. 954 (1952)).[3]

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[3] "Legislative prayer" is to be distinguished from such other forms of prayer as "court prayer" and "school prayer" (at least on the primary and secondary school levels) that may be *per se* unconstitutional. *See, e.g., N. Carolina Civil Liberties Union Legal Found. v. Constangy*, 947

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However, there are limitations, including the caveat that a governmental policy or practice providing for legislative prayer cannot be promulgated or maintained on the basis of impermissible motive. The concept of "impermissible motive" in the context of legislative prayer includes a prohibition against utilizing prayer to proselytize or advance any particular religion by sanctioning a preference for a particular set of beliefs as well as a prohibition against the disparagement of other faiths and beliefs. *Marsh*, 463 U.S. at 792-795, 103 S.Ct. 3330. The purpose for such a prohibition is, at a minimum, to preclude a governmental body from "establish[ing] a particular religion as the sanctioned or official religion of the legislative body." *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1234 (10th Cir.1998).

The Plaintiff asserts that the basic issue of whether the Board's policy is violative of the Establishment Clause must be resolved by a strict scrutiny analysis where the question is simply whether the policy dictates by its own terms a preference for any particular religion to the exclusion of others.[4] *Larson v. Valente*, 456 U.S. 228, 244, 246, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another . . . when we are presented with a state law granting a denominational preference, our precedents

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F.2d 1145 (4th Cir.1991); *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992).

[4] There is no evidence (or assertion) that the policy has been utilized ("as applied") in a disparate fashion whereby, for example, religious representatives of other non-monotheistic religions have been permitted to offer invocations. (Findings ¶ 7).

demand that we treat the law as suspect and we apply strict scrutiny in adjudging its constitutionality"); *see also Hernandez v. Comm'r.*, 490 U.S. 680, 695, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989) ("[W]hen it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions"); *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 339, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987) ("[L]aws discriminating *among* religions are subject to strict scrutiny") (emphasis in original); *Koenick v. Felton*, 190 F.3d 259, 264 ("Strict scrutiny in the Establishment Clause context is to be used to evaluate only those statutes that facially discriminate between religious denominations or between religion and non-religion") (citing *Hernandez*). Under a strict scrutiny analysis, if a statute or, as here, governmental policy is determined on its face to be unconstitutional, it can only be salvaged by an affirmative showing that the challenged provision is tailored as narrowly as possible to serve a compelling governmental interest. *Larson*, 456 U.S. at 247-248, 102 S.Ct. 1673.

Initially, the Plaintiff urges that the Board's policy fails a strict scrutiny analysis where it mandates a broad, unjustifiable preference for a particular set of religious beliefs to the exclusion of all others that thereby violates the constitutional mandate of the Establishment Clause that prohibits the entanglement of religion and government. Plaintiff additionally argues that even if the policy survives a strict scrutiny analysis, it still violates the Establishment Clause under the three-part test in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745

(1971),[6] decided before *Marsh*, whereby a statutory proscription (including, the Plaintiff asserts, the policy here) is deemed violative of the Clause unless: "[f]irst, the statute [at issue] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Lemon*, 403 U.S. at 612-613, 91 S.Ct. 2105 (citations omitted); *Koenick*, 190 F.3d at 265. However, even if it is determined that the *Lemon* test is not the appropriate framework for analysis, Plaintiff asserts that the policy is still not saved by the alternative analysis set forth in *Marsh*, as contended by the Defendant, because of the distinguishable circumstances involved in *Marsh*. (Pl.'s Mem. at 6).

The Defendant urges that the Supreme Court's decision in *Marsh* is dispositive in legitimizing its policy under the Establishment Clause whereby the practice of providing for an essentially benign solicitation for divine guidance consistent with the Judeo-Christian tradition is specifically sanctioned in *Marsh* and related precedent as nothing more than "simply a tolerable acknowledgment of beliefs widely held among the people of this country." (Def.'s Mem. at 5-10). The Defendant otherwise contends that the policy does not result in an unconstitutional entanglement of church and state because the random ("first-come, first-serve") invitation of voluntary, unpaid

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[6] The facts in *Lemon*, not relevant here, concerned challenges to separate state statutory schemes that provided public funding of salary incentives for parochial school teachers. The Court held both to be unconstitutional in violation of the Establishment Clause because of the excessive entanglement of church and state that resulted in a direct benefit to the religious entities involved. 403 U.S. 602, 91 S.Ct. 2105.

representatives of the Judeo-Christian religious community does not allow for the selective promotion of any particular religion. *Id.*

The policy here does not state a denominational preference among the monotheistic religions of the Judeo-Christian tradition. (Findings ¶ 3, 13). However, as clarified in the denial of Plaintiff's request, it specifies a preference between monotheistic religions of the Judeo-Christian tradition (as elements of what the stated policy refers to as the American civil religion) and polytheistic, pre-Christian, neo-pagan religions that the Defendant concluded included the Plaintiff's Wiccan beliefs. *Id.* The analysis could stop here, but for the possibility that the perceived preference may not be seen to be that clear and the judicial emphasis in case law (and by the parties) on the competing tests in *Lemon* or *Marsh* concerning issues involving legislative prayer and the resulting potential for "entanglement" of government and religion.[6]

As to the applicability of the *Lemon* test, although the Defendant professes that the purpose of the policy is non-sectarian, the primary effect of prayer, by definition, custom, and/or usage, is "preeminently religious rather than secular," thereby at least suggesting that the first prong of the *Lemon* test cannot be satisfied under any analysis.[7] *Marsh*, 463 U.S. at 797, 103 S.Ct. 3330 (Brennan,

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[6] Indeed, the Court of Appeals for this circuit has recently stated that "the *Lemon* test guides our analysis of Establishment Clause challenges." *Mellen v. Bunting*, 327 F.3d 355, 370 (4th Cir.2003) (citing *Koenick*, 190 F.3d at 264).

[7] Furthermore, the court has additional concerns about whether the prayers offered throughout the time the challenged policy has been in effect were truly non-sectarian since of the thirty-eight prayers offered between June 2001 and April 2003, twenty-eight requested

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J., dissenting); *see also Koenick*, 190 F.3d at 265 (explaining that *Lemon* "required that the state action possess a secular purpose"). Beyond that, the giving of a prayer can hardly be viewed as other than "the advancement of religion," at least in a general sense, even if the prayer itself is only a momentary, essentially benign event that could hardly be viewed as "an excessive entanglement between church and state." *Id.* Indeed, as noted by the court in *Mellen:*

> When a state-sponsored activity has an overtly religious character, courts have consistently rejected efforts to assert a secular purpose for that activity. Indeed, we have emphasized that "an act so intrinsically religious as prayer cannot meet, or at least would have difficulty meeting, the secular purpose prong of the *Lemon* test." And we have also recognized the obvious, that recitation of a prayer "is undeniably religious and has, by its nature, both a religious purpose and effect."

Mellen, 327 F.3d at 373 (citations omitted). *See also Constangy*, 947 F.2d at 1150 (finding religious purpose in practice of opening court with prayer because it involved "an act so intrinsically religious as prayer"); *Hall v. Bradshaw*,

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Jesus Christ's specific guidance (by name or implication), thereby indicating a strong preference for Christian beliefs and the conception of a deity. (Pl.'s Mem. ex. 6). It should also be noted that between January 2000 and December 2003, seventy-six individuals will have given invocations. Of those seventy-six, one was given by a Jewish Rabbi and two will have been given by a leader from the Islamic faith. Such numerical disparity casts further doubt on the Defendant's claim that the prayers that are offered actually satisfy the Board's own written policy requiring a non-sectarian invocation. (Def.'s Mem. ex. E). The court's analysis proceeds in any event, especially in light of the *Marsh* precedent.

630 F.2d 1018, 1020 (4th Cir.1980) (finding religious purpose in the inclusion of a "Motorist's Prayer" on a state map because prayer is "by its very nature, religious").

However, the court in *Marsh* chose not to follow the *Lemon* test, instead holding that a statute or policy does *not* have to have a secular purpose to comply with the Establishment Clause and it does not constitute a prohibited entanglement in violation of the Establishment Clause for government to at least tolerate religion in a general way.[8] However, the *Marsh* precedent is distinguishable from this case, if not all others that do not involve what *Marsh* refers to as an established chaplaincy practice in which the selection process is based on the person who would present the prayer and not on what particular religious persuasion is represented. Indeed, in *Marsh* the Court held that the chamber's established chaplaincy practice that involved a particular minister who happened to be of a Judeo-Christian religion (Presbyterian),[9] did not violate the Establishment Clause because the body wanted that individual to perform the function

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[8] It is also instructive, if not dispositive as to what test should apply, that the *Marsh* majority does not even refer to the *Lemon* analysis in its holding. The majority opinion in *Marsh* recites the history of the case that includes the court of appeals' reliance on *Lemon*, but it necessarily rejected its application to the issue of legislative prayer by reversing the lower court and adopting a separate rationale. *See Lynch v. Donnelly*, 465 U.S. 668, 679, 104 S.Ct. 1355, 79 L.Ed.2d 604 (explaining "[w]e did not, for example, consider that analysis [*Lemon*] relevant in *Marsh*").

[9] Although the Court in *Marsh* noted that guest chaplains were occasionally substituted to give the invocation, there is no indication that they were not of the same Judeo-Christian tradition and the circumstance of infrequent substitution does not appear to have been determinative in the Court's analysis in *Marsh* in any event. *Id.* at 793-794, 103 S.Ct. 3330.

and the practice of offering such legislative prayer "is deeply embedded in the history and tradition of this country" such that there is "no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged" where legislative prayer presents no more potential for establishment than the provision of school transportation ... beneficial grants for higher education ... or tax exemptions for religious organizations. *Id.* at 791, 103 S.Ct. 3330 (citing cases). The Court in *Marsh* noted and emphasized the historical record surrounding the nearly simultaneous adoption of the First Amendment and passage of legislation to authorize payment of a chaplain as clear evidence that such legislative prayer was not considered "as a proselytizing activity or as symbolically placing the government's 'official seal of approval on one religious view.'" *Id.* at 792, 103 S.Ct. 3330 (citing cases).[10]

Lower courts, both state and federal, have struggled to interpret and apply *Marsh* in a consistent fashion, with mixed success.[11] In *Snyder,* for example, a local governing

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[10] Interestingly, there is support for the historical interpretation that the focus of the Founding Fathers in including the Establishment Clause in the First Amendment was to promote and protect diversity within Christianity by protecting the fledgling Methodist and Baptist faiths from the seemingly omnipresent Anglican influence, "but today they [the words of the Establishment Clause] are recognized as guaranteeing religious liberty and equality to the infidel, the atheist, or the adherent of a non-Christian faith ...." *Wallace v. Jaffree,* 472 U.S. 38, 52, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985).

[11] Federal courts have also struggled with Supreme Court precedent regarding the Establishment Clause in the context of school prayer. *Mellen,* 327 F.3d at 370 ("[b]ecause the Court has applied a variety of tests (in various combinations) in school prayer cases, federal appellate courts have also followed an inconsistent approach").

body had prohibited a proposed speaker from presenting a supposed prayer that would have denigrated the body's policy of having an opening prayer. 159 F.3d 1227. The Tenth Circuit, on rehearing *en banc*, found that "the mainline body of Establishment Clause case law [before and after *Marsh*] provides little guidance for our decision in this case" and held that a legislative body can exclude those who seek to disparage legislative prayer. The court concluded that equal and unlimited public access to a program of legislative invocational prayer is not required since the practice sanctioned by *Marsh* of selecting a particular representative of a religious genre "has become part of the fabric of our society" and such a practice necessarily involves the exclusion of others, including those who would disparage the practice. *Id.* at 1233 (quoting *Marsh*, 463 U.S. at 792, 103 S.Ct. 3330). The court specifically noted, however, that invocational prayer in a legislative context may be violative *if* the selection process "stemmed from an impermissible motive" that includes a preference where a particular religion is recognized "as the sanctioned or official religion of the legislative body." *Id.* at 1234 (citing *Marsh*, 463 U.S. at 793-795, 103 S.Ct. 3330).

On the state level, the California Court of Appeals in *Rubin v. City of Burbank*, 101 Cal.App.4th 1194, 124 Cal.Rptr.2d 867, 873 (2002), distinguished *Marsh* on the basis that the prayer that was being challenged contained "an explicit invocation of a particular religious belief" and "[b]y directing the prayer to 'Our father in heaven . . . in the name of Jesus Christ' the invocation conveyed the message that the Burbank City Council was a Christian body, and from this it could be inferred that the council was advancing a religious belief."

Most recently in the Fourth Circuit, the Court of Appeals has addressed the issue involving the *Marsh* precedent in the context of state-supported college prayer. *Mellen*, 327 F.3d 355. In *Mellen*, the court distinguished *Marsh* on the basis that public universities and military colleges, including the college involved, did not "share" the same or comparable historical context as did the First Congress:[12]

> In upholding the Nebraska practice, Chief Justice Burger reasoned: "[t]his unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged."
>
> The Supreme Court has since emphasized that *Marsh* is applicable only in narrow circumstances. In *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, the Court recognized that the *Marsh* decision "relied specifically on the fact that Congress authorized legislative prayer at the same time that it produced the Bill of Rights." The Court expressly declined to interpret *Marsh* to mean that "all accepted practices 200 years old and their equivalents are constitutional today . . . " Likewise . . . we emphasized, in invalidating a judge's practice of opening court with a prayer, that *Marsh* was "predicated on the particular historical circumstances presented in that case."

Id. at 369-370 (citations omitted).

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[12] The majority opinion in *Mellen* is by a divided panel that was upheld upon the denial of a petition for rehearing by an equally-divided *en banc* court. 341 F.3d 312.

The court in *Mellen* proceeded to identify what it referred to as the "endorsement test" whereby "the government may not engage in a practice that suggests to the reasonable, informed observer that it is endorsing religion." *Mellen*, 327 F.3d at 370 (citing cases).[13] The endorsement test, as noted by the court in *Mellen*, "was first articulated by Justice O'Connor in her concurrence in *Lynch*, and later adopted by a majority of the Court in *County of Allegheny*." 327 F.3d at 378 (citations omitted). Both *Lynch* (1984) and *County of Allegheny* (1989) were decided after not only *Lemon* (1971), but also *Marsh* (1983), and although each case concerned facts not involving legislative prayer, they appear to articulate the most consistent standard for analysis in determining whether any governmental action, including that involved in legislative prayer, is premised on "impermissible motive." Under the endorsement test, the government may not convey or attempt to convey a message that religion or a particular religious belief is favored or preferred:

> Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The Establishment Clause, *at the very least*, prohibits government from appearing to take a position on

[13] The court also identified what it refers to as the "coercion test" by which "government may not coerce anyone to support or participate in religion or its exercise." *Id.* (quoting *Lee*, 505 U.S. at 587, 112 S.Ct. 2649). As the court confirmed in *Mellen*, such a test is a "prevailing consideration" in school prayer cases where there is a "captured audience" as opposed to a legislative prayer scenario in which the prayer is directed to those (the legislators) who authorized the practice and who can as readily repeal it and which involves a voluntary listening audience who can simply absent themselves during the brief exercise or ignore its momentary impact. Accordingly, the "coercion test" is not an appropriate constitutional measure for analyzing the policy at issue here.

> questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community."

County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 593-594, 109 S.Ct. 3086, 106 L.Ed.2d 472 (quoting *Lynch*, 465 U.S. at 687, 104 S.Ct. 1355) (O'Connor, J., concurring) (emphasis added).

Matters of religion are inextricably intertwined with issues of government and vice versa. Religious references adorn our courtroom walls and hallways, our currency, and religious reference is included in our Pledge of Allegiance. As Chief Justice Burger noted in *Lynch*, within a year of having authored the majority opinion in *Marsh*:

> In every Establishment Clause case, we must reconcile the inescapable tension between the objective of preventing unnecessary intrusion to either the church or the state upon the other, and the reality that, as the Court has so often noted, total separation is not possible.

465 U.S. at 672, 104 S.Ct. 1355.

Yet, the Establishment Clause provides a limit:

> [T]his heritage of official discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause. *Whatever else the Establishment Clause may mean . . . it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions).* "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."

County of Allegheny, 492 U.S. at 604-605, 109 S.Ct. 3086 (quoting *Larson*, 456 U.S. at 244, 102 S.Ct. 1673) (emphasis added).[14]

In *Lynch*, a city's practice of displaying a creche during the Christmas holiday season depicting the traditional nativity scene was upheld on the basis that there was a valid secular purpose involved "to celebrate the Holiday and to depict the origins of that Holiday" without sufficient "evidence to establish that the inclusion of the creche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message." *Id.* at 680, 104 S.Ct. 1355. In her concurring opinion, Justice O'Connor sought to clarify the Court's Establishment Clause doctrine by noting that one of the principal ways in which government can run afoul of the Establishment Clause is by the government's endorsement or disapproval of religion:

> Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the

[14] Justice Scalia, who has taken issue with various aspects of the Court's majority interpretation of the Establishment Clause over time, has stated in reference to his own reasoning on the subject that: "As for the Establishment Clause justification [offered in a school prayer context], I would hold, simply and clearly, that giving nondiscriminatory access to school facilities cannot violate that provision *because it does not signify state or local embrace of a particular religious sect.*" *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (Scalia, J. concurring) (emphasis added). Such reasoning at least suggests that Justice Scalia agrees that an established governmental preference for one set of religious beliefs over others is violative of the Establishment Clause.

> political community. Disapproval sends the opposite message.

Id. at 688, 104 S.Ct. 1355.

Justice O'Connor concluded that the holiday creche within a particular setting that also included purely secular symbols (such as Santa Claus and candy canes) did not constitute an endorsement of the Christian religion; rather, it was simply a celebration of a public holiday of cultural significance as expressed by traditional symbols that also had religious aspects. *Id.* at 691, 104 S.Ct. 1355.

A Christmas holiday creche was also the subject of challenge in *County of Allegheny,* along with a large (eighteen foot) Chanukah menorah and even larger (forty-five foot) Christmas tree. 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472. Unlike in *Lynch,* however, the Court (Justice Blackmun) held that the Latin caption over the creche, which translated meant "Glory to God in the Highest," constituted an unconstitutional endorsement or preference for the Christian religion in violation of the Establishment Clause because the patently Christian message glorified the birth of Jesus Christ and the placement of the display by itself in a prominent location inside a courthouse did not detract from the religious message being conveyed. At the same time, the Court upheld the constitutionality of the parallel display of the menorah and Christmas tree with a sign saluting liberty because the combined symbols within a benign setting on a city/county government complex front lawn simply signified pluralism and freedom of belief in the celebration of the same winter holiday season.

Perhaps most significantly, the majority in *County of Allegheny* took occasion to specifically endorse Justice

O'Connor's analytical framework in her concurring opinion in *Lynch* whereby any government endorsement, promotion, or preference of any particular faith is constitutionally prohibited. *Id.* at 595, 109 S.Ct. 3086. In addition, the majority also took note of Justice O'Connor's discussion of *Marsh* in her concurrence in *Lynch* in which she found that the legislative prayer in *Marsh, under those circumstances,*[18] did *not* constitute government endorsement of religion because it served the secular purpose of "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *County of Allegheny*, 492 U.S. at 595 n. 46, 109 S.Ct. 3086; *Lynch*, 465 U.S. at 691, 104 S.Ct. 1355. The majority opinion in *County of Allegheny* also adopted Justice O'Connor's "purpose and effect" approach first espoused in her concurring opinion in *Lynch* by holding that the effect of the creche under the facts of the case was an unconstitutional endorsement of religion by the promulgation of "a patently Christian message":

> [T]he government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context. These general principles are sound, and have been adopted by the Court in subsequent cases. Since *Lynch*, the Court has made clear that, when evaluating the effect of government conduct under the Establishment Clause, we must ascertain whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations

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[18] Which this court views as the selection of a particular individual to serve in an established chaplaincy program without apparent regard to his particular faith.

> as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."

492 U.S. at 597, 109 S.Ct. 3086 (quoting *Grand Rapids v. Ball*, 473 U.S. 373, 390, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985)).

Although *Lynch* and *County of Allegheny* involved religious symbols, not words (prayer), and although the Supreme Court based its holdings in both cases on a *Lemon* analysis, the general principle that prohibits the endorsement or preference of one religious faith or group of beliefs over others to the extent that the "nonadherents" fairly perceive their exclusion as disapproval of their religious choice is relevant and controlling in this case. Here, the policy, on its face, permits only adherents of "the American civil religion" to participate in giving invocations and American civil religion has been interpreted and applied by the Board as referring *only* to the monotheistic faiths of the Judeo-Christian tradition.[10] (Findings ¶¶ 3, 5, 13). Whether the policy is viewed as being based on impermissible motive, having the effect of creating a religious preference, or simply being – as Chief Justice Burger opined in *Lynch* – an entanglement of government and religion that is unnecessary, the governmental policy at issue here that prohibits anyone holding a different set of religious beliefs – however different – or no religious beliefs at all, from participating cannot comply with the

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[10] On one isolated occasion in the record presented, the Board deviated from its policy to the extent of inviting a leader of the Muslim religion. However, though not of the Judeo-Christian tradition, Islam, as the Muslim religion, is monotheistic in the same sense that it includes the belief that Allah is the sole deity and that Muhammad is his prophet. *Merriam Webster's Collegiate Dictionary* 620 (10th ed.1998).

Establishment Clause not only under a strict scrutiny analysis, but any other analytical model:

> The Supreme Court has instructed us that for First Amendment purposes religion includes non-Christian faiths and those that do not profess belief in the Judeo-Christian God; indeed, it includes the lack of any faith.

Glassroth v. Moore, 335 F.3d 1282, 1294 (11th Cir., 2003) (citing *Allegheny County*, 492 U.S. at 590, 109 S.Ct. 3086); *Wallace*, 472 U.S. at 53, 105 S.Ct. 2479 (holding "the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all"). Furthermore, the Defendant's argument that the Board's policy does not discriminate against any religion because religious representatives are invited on a "first-come, first-serve" basis is of no avail because those of non Judeo-Christian traditions are precluded from participating by the terms of the Board's policy.

In addition, even if under a strict scrutiny analysis the policy is seen as serving a compelling governmental interest by the solemnization of proceedings (or other laudable purpose), it is not tailored as narrowly as possible, as required, to achieve such purposes.[17] The policy, as enforced, has allowed, if not encouraged, the specific

[17] Although it appears unnecessary and/or inappropriate because of basic separation-of-powers principles for the court to determine what specific practice should be substituted in order to pass constitutional muster, such analysis is relevant in determining whether the policy is narrowly drawn so as to survive constitutional challenge and it seems disingenuous to simply say what cannot be done without at least suggesting what can, subject to legislative will.

mention of the Judeo-Christian deity as well as the name of Jesus Christ, references similar to those found violative in *County of Allegheny* and *Rubin*,[18] and it precludes the expression of common themes that would still serve the same public interest even though the speaker may be the representative of a religion outside that sanctioned by the policy. (Finding ¶ 12). In this regard, absent total abandonment of the practice of having any invocations or simply rotating the activity among the members of the Board itself in random fashion, one possible approach that demonstrates the policy is not narrowly tailored is that reference in the policy to the restriction that all invitees must be representatives of the American Civil religion in the Judeo-Christian tradition could simply be deleted. The sole qualification could then be substituted that the non-sectarian invocations to be presented must only serve, in Justice O'Connor's words, to solemnize the occasion by "expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society," without being "used to proselytize or advance any one faith or belief" (as already stated in the policy) by reference to any specific deity or symbol (for instance, Jesus Christ), or to "disparage any other faith or belief."

The question remains whether Wicca must be considered to be a valid religion as a necessary basis for its adherents, including the Plaintiff, to invoke constitutional protection. The short and dispositive answer to the question

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[18] Recently, the district court in *Wynne v. Town of Great Falls*, No. 0:01-3409-22 (D.S.C. Aug. 21, 2003), held the practice whereby a member of a town council offered an opening and closing prayer in which the name of Jesus Christ was typically invoked to be violative of the Establishment Clause.

is that whatever one may think of a group that calls its local chapter the Broom Riders Association, Wicca has been recognized as a religion in this federal judicial circuit and elsewhere[10] on the basis that it "occupies a place in the lives of its members 'parallel to that filled by the orthodox belief in God' in religions more widely accepted in the United States." *Dettmer v. Landon*, 799 F.2d 929, 931 (4th Cir.1986) (quoting *United States v. Seeger*, 380 U.S. 163, 166, 85 S.Ct. 850, 13 L.Ed.2d 733 (1964)); (Pl.'s Mem. ¶ 26). Accordingly, where Wicca is recognized as a valid religion, the policy, in its present form, must be viewed as violative of the Establishment Clause because of its preference for certain other faiths.

Free Speech/Free Exercise/Equal Protection

The Plaintiff also asserts additional constitutional claims that are appropriate to consider to at least insure comprehensive understanding and probable review. Reduced to simpler terms, Plaintiff claims that the policy denies her the constitutional right to express and exercise her religious beliefs as others are permitted to do. In this regard, the issue of whether she has been denied her full, free, and equal right to express and exercise her religious beliefs is subject to a unitary analysis. *Columbia Union College v. Clarke*, 159 F.3d 151, 155 n. 1 (4th Cir.1998) (citing cases) (requiring courts to consider the alleged denial of free speech, free exercise, and equal protection "as one constitutional inquiry").

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[10] *See also U.S. Army Chaplains' Handbook: Excerpt on Wicca*, <http://www.religioustolerance.org/wic_usbk.htm> (last visited October 28, 2003).

The threshold inquiry is whether the speech involved is "private speech" or "government speech." If it is the latter, the First Amendment guarantees with respect to free expression and exercise of religion are not implicated:

> [T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.

Bd. of Educ. v. Mergens, 496 U.S. 226, 250, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (emphasis in original).

If, on the other hand, the activity is viewed as private speech or any variation thereof, certain caveats apply, depending on the type of forum:

> Traditional public fora are defined by the objective characteristics of the property, such as whether, "by long tradition or by government fiat," the property has been "devoted to assembly and debate." The government can exclude a speaker from a traditional public forum "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest."
>
> Designated public fora, in contrast, are created by purposeful governmental action. . . . If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny.
>
> Other government properties are either nonpublic fora or not fora at all. The government can restrict access to a nonpublic forum "as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view."

Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677-678, 118 S.Ct. 1633, 140 L.Ed.2d 875 (citations omitted).

In order to determine the character of the "speech," it is necessary to identify both its purpose and effect. Here, the speech is the invocation itself that can – and must – be viewed separately from the balance of the Board's agenda that obviously includes varying and shifting forms of speech. The avowed purpose of the invocation is simply that of a brief pronouncement of simple values presumably intended to solemnize the occasion. (Findings ¶ 3). The invocation is not intended for the exchange of views or other public discourse. *Id.* Nor is it intended for the exercise of one's religion, at least in the sense of being recognized as a designated aspect of religious practice; rather it is utilized – at most – as an announcement of faith.[20] The context, and to a degree, the content of the invocation segment is governed by established guidelines by which the Board may regulate the content of what is or is not expressed when it "enlists private entities to convey

[20] While the Plaintiff is correct – contrary to the Defendant's assertions – that it is not necessary for Plaintiff to establish that she suffered a "substantial burden" on the exercise of her religion in order for strict scrutiny analysis to apply, it is nevertheless a relevant consideration in determining the nature of the speech. *Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). *See also Brown v. Borough of Mahaffey*, 35 F.3d 846, 849-850 (3rd Cir.1994) (citations omitted); *Columbia Union College*, 159 F.3d 151 (4th Cir.1998); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3rd Cir.2002); *Davey v. Locke*, 299 F.3d 748 (9th Cir.2002); *Peter v. Wedl*, 155 F.3d 992 (8th Cir.1998).

its own message." *Rosenberger v. Rector,* 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995).[11]

As to the effect and/or impact of the invocations demonstrated by a sample review of those that have been offered, they are but brief, benign pronouncements of simple values that are not controversial nor confrontational but for, at most, mention of specific Judeo-Christian references that are nevertheless clearly recognized as symbols of the universal values intended to be conveyed. (Pl.'s Mem. ex. 6). It is also noted that there is a separate and distinct opportunity on the Board's agenda for public discussion and comment that is more clearly that of a forum for public discourse. (Findings ¶ 8). Given all of these characteristics and circumstances, the subject speech here "sounds" more than anything else like the government speech at issue in the student initiated pre-football game invocations held by the Supreme Court in *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000), *not* to be private speech and thereby subject only to the proscriptions of the Establishment Clause:

> It reminds us that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." We certainly agree with that distinction, but are not persuaded that the pre-game invocations should be regarded as "private

[11] Perhaps the real significance of the historical record in which the First Congress approved the hiring of a chaplain to open each session with an invocation within days of having approved the First Amendment is that the Founding Fathers did not view such activity as private speech subject to all First Amendment strictures.

> speech." These invocations are authorized by a government policy and take place on government property at government-sponsored school-related events. . . . The Santa Fe school officials simply do not "evince either 'by policy or by practice,' any intent to open the [pregame ceremony] to 'indiscriminate use,' . . . by the student body generally." Rather, the school allows only one student . . . to give the invocation. The statement or invocation, moreover, is subject to particular regulations that confine the content and topic of the student's message.[22]

Id. at 302, 120 S.Ct. 2266 (emphasis in original).

At the same time, and in the alternative, *if* the invocation could be viewed as private speech, a so-called forum analysis must be employed to analyze the issues involved where, as our circuit court has recently reaffirmed, "forum analysis [is] the means of analyzing restrictions placed on private speech that occurs on government property." *Goulart v. Meadows*, 345 F.3d 239, 248 (4th Cir.2003) (citing cases).[23] If the invocation constitutes any type of

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[22] The court cannot conceive of a scenario involving the same aspects of the present situation involving controlled speech without the option for discourse or debate that could realistically be viewed as private speech subject to the personal First Amendment protections of free, full and equal expression and exercise of one's beliefs.

[23] A forum, by definition, may be a place, as in a public meeting place for open discussion, or a thing, as in a medium where open discussion is involved in both and each involves private speech. For example, the Supreme Court in *Rosenberger*, 515 U.S. at 830, 115 S.Ct. 2510, pointed out that the forum in that case was "a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable." In *Forbes*, the Court also recently had to determine if a particular debate was a limited public forum or a nonpublic forum so that the correct standards could be applied. 523 U.S. 666, 118 S.Ct. 1633, 140 L.Ed.2d 875.

forum, it must be viewed as a limited public forum to which a specified class of speaker is invited or permitted for a specific purpose and where it is clearly not the open forum designated by habit, custom, or otherwise for unrestricted public discourse, such as the proverbial street corner.[24] In the limited public forum, a certain degree of governmental discretion is permitted, but subject to constitutional restrictions. The core restriction is that the designation of the class of speakers must be viewpoint neutral and those of "similar character" to the designated class cannot be excluded:

> When a particular forum is classified as a designated/limited public forum, "[t]wo levels of First Amendment analysis" apply: the "internal standard" and the "external standard." *Id.* at 193-94. The "internal standard" applies to situations where "'the government excludes a speaker who falls within the class to which a designated [limited] public forum is made generally available.'" *Id.* at 193 (quoting *Forbes*, 523 U.S. at 677, 118 S.Ct. 1633) (alteration in

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[24] In *Santa Fe Indep. Sch. Dist.*, the Court specifically addressed the limited question of whether a policy permitting student-led, student-initiated prayer at football games violated the Establishment Clause of the First Amendment. 530 U.S. at 301, 120 S.Ct. 2266. However, its discussion of what constitutes a public or private forum for First Amendment purposes generally is still relevant for purposes of any analysis regarding the balance of First Amendment issues. *Id.* at 303, 120 S.Ct. 2266 ("As we concluded in *Perry*, 'selective access does not transform government property into a public forum.'") (citing *Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)). Yet another term sometimes used is "designated public forum" that refers to a forum opened only to a limited class of speakers or for limited purposes. However, the Fourth Circuit has held that the term and concept it represents is coterminous with a limited public forum. *Goulart*, 345 F.3d at 250 (citing *Warren v. Fairfax County*, 196 F.3d 186 (4th Cir.1999) (*en banc*)).

> *Warren).* In this situation, the government's "'action is subject to strict scrutiny.'" *Id.* at 193 (quoting *Forbes,* 523 U.S. at 677, 118 S.Ct. 1633). In other words, "as regards the class for which the forum has been designated, a limited public forum is treated as a traditional public forum." *Id.* On the other hand, the "external standard" "places restrictions on the government's ability to designate the class for whose especial benefit the forum has been opened." *Id.* at 194. We explained that "once a limited forum has been created, entities of a 'similar character' to those allowed access may not be excluded." *Id.* at 194 (citing, *inter alia, Perry,* 460 U.S. at 48, 103 S.Ct. 948). The government's designation of the class for the "external standard" is "subject only to the standards applicable to restrictions on speakers in a nonpublic forum," namely that "the selection of a class by the government must only be viewpoint neutral and reasonable in light of the objective purposes served by the forum." *Id.*

Id. at 250.

The initial inquiry, therefore, is what is the "class" of speakers invited to participate in the invocations in this case? The constitutionality of the class definition is determined by the reasonableness of the restrictions the government may place on access to the limited public forum in light of the purpose of the forum:

> The government's decision to restrict access to a limited public forum "need only be *reasonable;* it need not be the most reasonable or the only reasonable limitation." *Cornelius,* 473 U.S. at 808, 105 S.Ct. 3439 (emphasis in original). Reasonableness in this context is assessed "in light of the purpose of the forum and all the surrounding circumstances." *Id.* at 809, 105 S.Ct. 3439. In other words, "[c]onsideration of a forum's

> special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in the light of the characteristic nature and function of the particular forum involved." *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650-51, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981).

Id. at 255.

On the one hand, the class in this controversy could be defined, as the policy provides, to be those religious representatives of the American civil religion who only espouse the values of the Judeo-Christian tradition. On the other hand, if the class is defined as simply those who are prepared to espouse basic values by the medium of prayer, which is not confined or defined by a particular religious bent, then the class may be fairly viewed as encompassing the leaders of at least all recognized religions.[28] As to the former basis of class identification, it cannot be realistically asserted that the class can be defined by discriminatory/exclusionary terms and/or conditions where, by doing so, any class could be so restricted as to render the requisite forum analysis meaningless. The purpose of the invocations can be seen objectively as the solemnization of the occasion through the medium of prayer. Prayer is not unique to any particular religion; if anything, it is typical of all valid religions and therefore the purpose of "the forum" can be attained (and maintained) without reference to a specific religious heritage and/or its references such

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[28] Where religion is broadly defined as a belief or set of beliefs that "occupies a place in the lives of its members 'parallel to that filled by the orthodox belief in God' in religions more widely accepted in the United States." *Dettmer*, 799 F.2d at 931.

that any exclusionary restriction based on religious viewpoint cannot be deemed to be reasonable – or constitutional.

Accordingly, if the class of speakers here is simply made up of those who would espouse basic themes consistent with, for example, that articulated by Justice O'Connor ("expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society"), then the Plaintiff, who is a representative of a recognized religion who stood ready to present an invocation consistent with such a theme, cannot not be excluded from participation in the limited/designated public forum because such action violates her First and Fourteenth Amendment rights of equal and free expression and free exercise of her religious beliefs. Therefore, either the policy is violative of the Establishment Clause and the invocation is government speech to which the remaining proscriptions of the First Amendment do not apply, or the invocation segment constitutes a limited or designated public forum in which the Board's policy is also violative of the Plaintiff's First and Fourteenth Amendment rights to the free, full, and equal exercise and expression of her religious beliefs because of its lack of viewpoint neutrality.

CONCLUSION

Religion has united – and divided – the human condition over the ages. Our government has struggled to find an acceptable accommodation of the common interests of religion and government that are inextricably intertwined. The relationship is most dramatically demonstrated by examples such as every congressional session – from the

earliest sessions – beginning with prayer, the specific invocation of the Christian deity on our currency ("In God We Trust"), and the solicitation of the same divine countenance in our Pledge of Allegiance (" . . . one nation, under God . . . ")[26]

The courts have struggled with a body of case law that is most charitably described as mercurial. Indeed, within the recent past, no less than the chief justice of a state supreme court has defied federal judicial authority by refusing to obey a court directive to remove from a court facility no less an overtly religious symbol than a monument honoring the Ten Commandments. *Glassroth v. Moore,* 242 F.Supp.2d 1067 (M.D.Ala.2002). Nevertheless, a central theme appears to this court to have arisen out of the morass. If the Establishment Clause means anything, it means that government is not to demonstrate any preference for one set of religious beliefs over another, or for that matter, over the lack of any religious belief. In addition, although a content-controlled governmental program format that does not allow for discourse or debate is not considered by at least this court as a forum subject to the remaining strictures of the First Amendment, *if* government establishes a forum to which it invites a class of speakers for a specific purpose, it cannot exclude some class members because of a difference in viewpoint. Here, Plaintiff is a representative of an acknowledged, albeit minority religion. Nevertheless, she stood prepared to offer an invocation consistent with the only guidelines government could constitutionally command under the circumstances. She

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[26] The constitutionality of which is presently under challenge before the Supreme Court. *Elk Grove Unified Sch. Dist. v. Newdow,* 540 U.S. 945, 124 S.Ct. 384, 157 L.Ed.2d 274, 2003 WL 21134177 (2003).

was presumptively excluded because of a stated governmental preference for a different set of religious beliefs and viewpoint, albeit the beliefs of a large segment – if not the majority – of the population. Such a policy of exclusion cannot survive constitutional scrutiny.

It is therefore ORDERED that the Plaintiff's Motion for Summary Judgment is GRANTED in part and DENIED in part. It is GRANTED to the extent that the subject policy of the Defendant is found to be in violation of the Establishment Clause of the First Amendment. The Plaintiff's motion is DENIED in all other respects. It is further

ORDERED that the Defendant's Motion for Summary Judgment is likewise GRANTED in part and DENIED in part. It is GRANTED only insofar as the Plaintiff's claims of constitutional violation on other than the basis of the Establishment Clause are herein denied. The Defendant's motion is DENIED in all other respects.

It is so ORDERED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
May 10, 2005

No. 04-1045
CA-02-888-3

CYNTHIA SIMPSON

Plaintiff-Appellee

v.

CHESTERFIELD COUNTY
BOARD OF SUPERVISORS

Defendant-Appellant

NATIONAL LEGAL FOUNDATION

Amicus Supporting Appellant

No. 04-1141
CA-02-888-03

CYNTHIA SIMPSON

Plaintiff-Appellant

v.

CHESTERFIELD COUNTY
BOARD OF SUPERVISORS

Defendant-Appellee

NATIONAL LEGAL FOUNDATION

Amicus Supporting Appellee

On Petition for Rehearing and Rehearing En Banc

The appellee's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Wilkinson, Judge Niemeyer, and Judge Williams.

For the Court,

/s/ Patricia S. Connor
CLERK

No. 05-195

Supreme Court, U.S.
FILED
AUG 30 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

CYNTHIA SIMPSON,

Petitioner,

vs.

CHESTERFIELD COUNTY
BOARD OF SUPERVISORS,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit correctly concluded that Chesterfield County, Virginia's policy of inviting monotheistic religious leaders to give nonsectarian invocations complies with the Establishment Clause as applied in *Marsh v. Chambers*.

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BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Respondent, Chesterfield County, Virginia ("County"), by counsel, respectfully requests the Court to deny the petition of Cynthia Simpson ("Simpson") for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on April 14, 2005.

STATEMENT OF THE CASE

A. Procedural Posture of the Case

On December 6, 2002, Simpson filed a complaint in the United States District Court for the Eastern District of Virginia claiming that the County's policy of inviting volunteers among a cross-section of religious leaders to give invocations to the County's governing body, the Board of Supervisors ("Board"), violated the Establishment Clause of the First Amendment. (Joint Appendix in the Fourth Circuit ("J.A.") pp. 8-13) Simpson claimed as well that the County's selection process for invocations facially violated the Free Exercise and Free Speech clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Both parties filed motions for summary judgment. (J.A. pp. 22-24, 199-200) Simpson argued before the trial court that *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and subsequent *Lemon*-based case law, should supplant *Marsh v. Chambers*, 463 U.S. 783 (1983) as the determinative law in deciding the constitutionality of the County's invocation selection process. Prior to making its decision, the district court considered documentary evidence as well as testimony from elected

officials, the deputy clerk of the Board and Simpson. (J.A. pp. 25-106, 201-558).

On November 13, 2003 Magistrate Judge Dennis W. Dohnal granted, in part, Simpson's motion for summary judgment, declaring unconstitutional under the Establishment Clause the Board's method of selecting religious leaders to give invocations. *Simpson v. Chesterfield County Board of Supervisors*, 292 F. Supp. 2d 805 (E.D. Va. 2003).[1] The court came to its decision by rejecting *Marsh v. Chambers* as the decisional calculus for examining legislative prayer under the Establishment Clause and, instead, substituting *Lemon*-based jurisprudence such as *Larson v. Valente*, 456 U.S. 228 (1982) (finding that a state reporting requirement for contributions applying only to certain religions was a "denominational preference" and, therefore, violative of the Establishment Clause) and *Lynch v. Donnelly* 465 U.S. 668 (1984) (finding governmental "endorsement" of religion in religious displays violative of the Establishment Clause). In departing from settled law, the trial judge observed that "several courts, including our own Fourth Circuit, want to escape somewhat of Marsh." J.A. p. 179; contra, *see Simpson v. Chesterfield County Board of Supervisors*, 404 F.3d 276, 280-82 (4th Cir. 2005).

The trial court also attempted to distinguish factually the invocation practice in *Marsh* from the County's invocation practice. For example, the trial court decided that *Marsh* could only be applied to cases where a legislative body hires a paid chaplain, despite the fact that the

[1] While finding that the Board's invocation policy violated the Establishment Clause, the trial court also granted the County's motion to dismiss Simpson's Free Exercise, Free Speech and Equal Protection claims. 292 F. Supp. 2d at pp. 818-22.

Supreme Court in *Marsh* expressly embraced the constitutionality of a variety of practices for delivering legislative prayers, including the very practice the County used of rotating unpaid voluntary clergy. Compare, *Simpson*, 292 F. Supp. 2d at 812-13 with *Marsh*, 463 U.S. at 794, n.18. The trial court also dismissed the significance of the Nebraska legislature having hired a Presbyterian minister as its chaplain for 16 straight years as nothing more than a normal preference of politicians to hire people with whom they are compatible. *Simpson*, 292 F. Supp.2d at 813. Ultimately, the trial court held that "the analysis of [the case] could stop" at the following factual distinction: the Nebraska Legislature's invocation policy merely "state[d] a denominational preference among monotheistic religions of the Judeo-Christian tradition" while the County's policy stated "a preference between monotheistic religions of the Judeo-Christian tradition . . . and polytheistic, pre-Christian neo-pagan religions . . . " *Id.* at 811.

On April 14, 2005, in a unanimous decision, the Fourth Circuit Court of Appeals reversed the trial judge's decision. Writing for the court, Judge J. Harvie Wilkinson, III, held that the County's policy of using self-selected, volunteer religious leaders to give invocations " . . . fits within the Supreme Court's requirements for legislative prayer" because the policy does not "proselytize or advance any one or [] disparage any other faith or belief." *Simpson v. Chesterfield County Board of Supervisors*, 404 F.3d 276, 278 (4th Cir. 2005), citing *Marsh*, 463 U.S. at 794-95.[2]

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[2] Although Judge Wilkinson mentioned Simpson's Free Exercise claim in his opinion, Simpson had already abandoned her Free Exercise claim on appeal to the Fourth Circuit. Simpson now attempts to revive her Free Exercise claim in this petition while abandoning her Free

(Continued on following page)

Judge Wilkinson's opinion rejects the trial court's suggestion that the Fourth Circuit was "distancing" itself from *Marsh*. Instead the opinion reconfirms that " ... Fourth Circuit case law demonstrates not an intent to escape *Marsh* but a determination to apply it as the Supreme Court has directed" and that *Marsh* provides the "appropriate rubric" for deciding questions regarding legislative prayer. "Chesterfield has followed the standards that control – those of *Marsh*." 404 F.3d at 287. The Fourth Circuit found that Chesterfield's policy "echoes rather than exceeds" *Marsh's* teachings. "[T]he restraints made plain in the Board's policy and respected by those who lead invocations ensure that the prayers do not 'proselytize or advance any one, or [] disparage any other, faith or belief.'" 404 F.3d at 284. The court concluded that the County's long practice of inviting a broad range of religious leaders (Protestant, Catholic, Jewish, Islamic, Mormon, and other independent faiths) ensured that the County had not "affiliated the County with any one specific faith." 404 F.3d at 286. Finally, the court affirmed the trial court's finding that the County's invocations are not intended for the exchange of views or other public discourse, but are subject to broadly-defined guidelines established for the purpose of enlisting private invocation-givers to give invocations directly to, and for the exclusive benefit of, the Board. 404 F.3d at 288 As such, the invocations are not private speech at all, but government speech,

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Speech claim. Accordingly, the only non-Establishment Clause claim left in this petition is Simpson's Equal Protection claim. (See Simpson's Brief to Fourth Circuit at pp. 1, 34-38).

which is protected only by the Establishment Clause, not the Equal Protection Clause. *Id.*[3]

On April 26, 2005 Simpson filed a motion to rehear Judge Wilkinson's decision en banc. Simpson's petition for rehearing was denied. Not a single judge of the Fourth Circuit even asked that a poll be conducted on whether to rehear the case.

B. Statement of Facts

Chesterfield County is a suburban locality located immediately south of Richmond, Virginia with a population of about 285,000. For many years the elected Board of Supervisors has opened its legislative meetings with an invocation given by religious leaders from congregations serving Chesterfield residents. 292 F. Supp. 2d at 807. A year after the United States Supreme Court's decision in *Marsh v. Chambers*, 463 U.S. 783 (1983), upheld the constitutionality of invocations, the Board adopted a formal invocation policy embracing the Supreme Court's language in *Marsh*. *Id.* The County's invocation policy states that each invocation to the Board which is given by a religious leader "must be non-sectarian with elements of the American civil religion and must not be used to proselytize or advance any one faith or belief or to disparage any other faith or belief." *Id.*

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[3] In an opinion years earlier, Justice Ginsburg, then a Judge of the D.C. Circuit Court of Appeals, had understood that legislative invocations are government speech by noting that the Free Speech Clause is inapplicable to government invocations. *Kurtz v. Baker*, 829 F.2d 1133, 1147 (D.C. Cir. 1987) (Ginsburg, J., dissenting).

The Board of Supervisors does not participate in the selection of the person giving an invocation. Instead, each year the Clerk of the Board sends out a letter to "religious leaders" of congregations serving the County inviting them to give invocations to the Board. Those religious leaders who respond are then scheduled to give the invocations on a "first-come, first-serve" basis. No one from the County or the Board of Supervisors reviews the content of the invocations prior to delivery. However, all religious leaders are advised in writing that they should avoid sectarian references when giving invocations. 404 F.3d at 279.[4]

Invocations in Chesterfield County are " . . . for the benefit of the Board" alone and are directed only at the legislators. (J.A. pp. 246-47); *See also, Simpson* 404 F.3d at 289-90 (Neimeyer, J., concurring). Through the years, the invocations have been given by religious leaders from multiple faiths and traditions employing a wide variety of prayers. 404 F.3d at 284.[5] The trial court specifically

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[4] The letter sent by the Clerk of the Board to religious leaders states:

> As in the past, the purpose of our invocation is to invoke divine guidance for the Board in the conduct of their public business. Your invocations should be "non-sectarian" meaning that the invocation should generally invoke the guidance of God as a Supreme Being but should not contain references that are peculiar to any particular religion, denomination or sect. As examples, invocations should not include references to religious figures such as Jesus Christ, to images such as a crucifix, or to teachings from such sources as the Koran or the Book of Mormon. We appreciate you preserving this constitutional requirement when giving an invocation to the Board.

[5] Contrary to Simpson's assertion in footnote 2 in her Petition, Jewish rabbis and Islamic imams were invited to give, and in fact gave,

(Continued on following page)

found that the invocations are " . . . brief, benign pronouncements of simple values that are not controversial nor confrontational but for, at most, mention of specific Judeo-Christian references that are nevertheless clearly recognized as symbols of the universal values intended to be conveyed." 404 F.3d at 279, quoting 292 F. Supp. 2d at 820.

In August 2002, Simpson, a practicing Wiccan, requested that she be added to the list of religious leaders invited to give invocations to the Board. 292 F. Supp. 2d at 807.[6] Simpson belongs to the "reclaiming" tradition of Wicca and is a member of the Broom Riders Association, a group practicing a Wiccan form of witchcraft. In Simpson's words, her "personal spiritual practice . . . has a witchcraft focus." (J.A. 415, 438, 447) Simpson was advised that she would not be allowed to give an invocation because:

> Chesterfield's non-sectarian invocations are traditionally made to a divinity that is consistent with the Judeo-Christian tradition. Based upon our review of Wicca, it is neo-pagan and invokes polytheistic, pre-Christian deities. Accordingly, we cannot honor your request to be included on the list of religious leaders that are invited to

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invocations to the Board well before Simpson's 2002 request to be a prayer giver. (See J.A. pp. 534, 547-54)

[6] Wicca is a pagan form of "modern witchcraft" which was started around 1940 in the United Kingdom by Gerald Gardner and came to the United States in the 1960's. Wicca is both pantheistic and polytheistic in that it worships gods and goddesses such as Kore, Diana, Hecate, and Pan. The Wiccan "notion of deity" differs from the Jewish, Christian and Islamic traditions in that witches believe in immanent or metaphorical deities, energies or "life forces" rather than in a transcendent or supreme deity. (J.A. 30-59)

provide invocations at the meetings of the Board of Supervisors. (J.A. 350)

After receiving the answer to her request, Simpson renewed her request to the Board of Supervisors to be allowed to give an invocation or, in the alternative, to eliminate prayers entirely at the Board's meetings. (J.A. 351-52) The Board then considered whether to amend the policy to allow her to give an invocation or to make an exception to the policy to allow her to give an invocation. The Board declined to either change the policy or make an exception to the policy for Simpson. 292 F. Supp. 2d at 808.

REASONS FOR DENYING THE WRIT

A. The United States Court of Appeals for the Fourth Circuit Properly Applied *Marsh v. Chambers* to Uphold the County's Invocation Policy

Simpson's lawsuit challenges Chesterfield County's policy relating to legislative invocations, an area of law controlled by this Court's seminal decision in *Marsh v. Chambers*, 463 U.S. 783 (1983). In *Marsh*, the Court approved the invocation practice of the Nebraska legislature against an Establishment Clause attack, holding that:

(1) opening legislative sessions with a religious invocation "in the Judeo-Christian tradition" was an historic practice that flourished both before and after the adoption of the Establishment Clause, 463 U.S. at 786-93;